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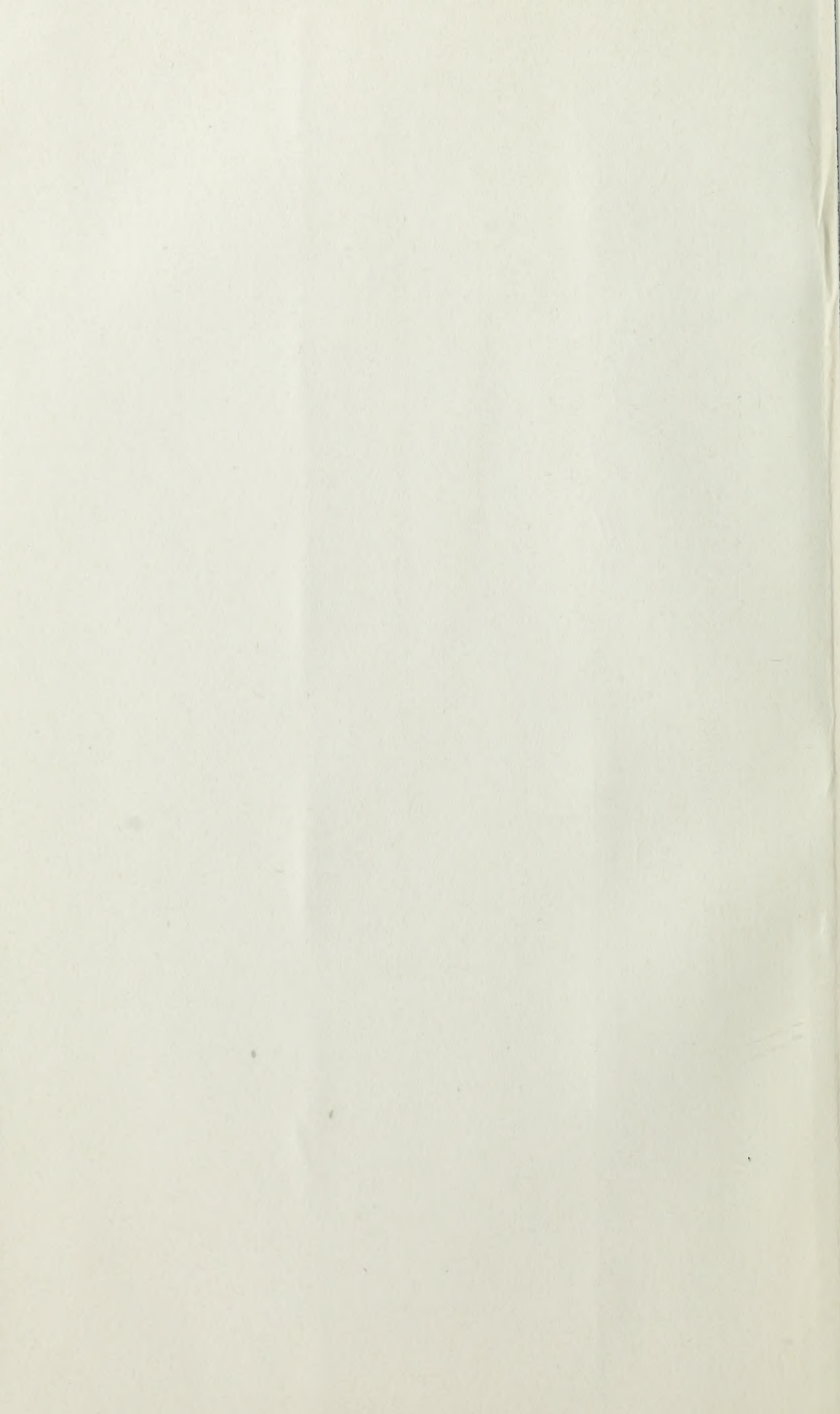
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No. 12442

**United States
Court of Appeals**
for the Ninth Circuit.

JOHN I. HAAS, INC., a corporation,
Appellant,
vs.

O. L. WELLMAN,
Appellee.

Transcript of Record

**Appeal from the United States District Court,
for the District of Oregon.**

FILED

MAR 9 - 1950

PAUL P. O'BRIEN,
CLERK

No. 12442

United States
Court of Appeals
for the Ninth Circuit.

JOHN I. HAAS, INC., a corporation,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

ROBERT M. KERR,

STUART W. HILL,

Equitable Building,
Portland 4, Oregon,
for appellant.

MAGUIRE, SHIELDS, MORRISON and
BAILEY,

ROY F. SHIELDS,

WILLIAM E. DAUGHERTY,

RANDALL B. KESTER,

723 Pittock Block,
Portland, Oregon,
for appellee.

In the District Court of the United States
for the District of Oregon

Civil Action No. 4158

O. L. WELLMAN,

Plaintiff,

vs.

JOHN I. HAAS, INC.,

Defendant.

COMPLAINT

Now comes plaintiff and for his complaint alleges :

I.

Plaintiff is a citizen of the State of Oregon and defendant is a corporation incorporated under the laws of the State of Delaware. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

II.

On or about February 7, 1944, plaintiff and defendant entered into a contract by which, as subsequently modified, it was agreed that plaintiff would sell, and defendant would buy, one-half of the saleable crop of late cluster hops grown by plaintiff on a certain farm in Clackamas County, Oregon, during the 1947 hop season; that said hops were to be delivered when ready for delivery in a designated warehouse at Mt. Angel, Oregon, and

that upon such delivery defendant would pay for said hops the "growers market price" to be determined in the manner specified in said contract.

III.

Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed, and delivered said hops (which weighed 37,650 pounds net) in said warehouse. Said hops were received, inspected and weighed in by defendant in said warehouse on September 25, 1947, and plaintiff obtained a warehouse receipt therefor. The "growers market price" for said hops determined in the manner specified by said agreement was eighty-five cents per pound, or a total of \$32,002.50. Plaintiff duly tendered possession of said hops to defendant conditioned that defendant at the time of taking such possession pay to plaintiff the purchase price of said hops. The defendant refused to pay said purchase price, or any part thereof, and said hops remained in said warehouse until disposed of as hereinafter alleged. Hops are of a perishable nature and begin to deteriorate shortly after they are harvested.

IV.

Due to an over production of hops during the 1947 season, general market prices of hops began a downward trend toward the end of September, 1947, and thereafter declined rapidly until they reached a level of less than one-half of the "growers market price" provided for in said contract. With-

out rejecting said hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops; and at that time, and from time to time thereafter defendant suggested that plaintiff try to find some other buyer for said hops. The parties from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract. On or about May 7, 1948, and after defendant had been in default in the payment of said sale price an unreasonable time, plaintiff, after notice to defendant and without waiving his rights against defendant, sold said hops to another buyer at a price of \$11,904.31, which was the best price obtainable therefor.

V.

After crediting said resale price of \$11,904.31 on said contract price of \$32,002.50 there remains due and owing to the plaintiff the sum of \$20,098.19 which the defendant wrongfully refuses to pay.

Wherefore plaintiff demands judgment against defendant for the sum of \$20,098.19, interest, and costs.

/s/ ROY F. SHIELDS,

/s/ WILLIAM E. DAUGHERTY,

Attorneys for Plaintiff.

MAGUIRE, SHIELDS, MORRI-
SON & BAILEY,
of Counsel.

[Endorsed]: Filed July 9, 1948.

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT

The defendant moves the Court for an order requiring the plaintiff to make a more definite statement of the matters set forth in paragraph II of the complaint now on file herein, in the following respects:

(a) The terms and provisions of the contract entered into on or about February 7, 1944.

(b) The date on which said contract was "subsequently modified."

(c) The manner in which said contract was so modified.

(d) The terms and provisions of said modification.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for Defendant.

NOTICE OF MOTION

To: Roy F. Shields, William E. Dougherty, Attorneys for Plaintiff.

Please take notice that the undersigned will bring the foregoing motion on for hearing before the above-entitled Court on the 16th day of August, 1948, at 10 o'clock A.M., or as soon thereafter as counsel may be heard.

/s/ ROBERT M. KERR,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 2, 1948.

[Title of District Court and Cause.]

AMENDED ANSWER

For answer to the complaint of the plaintiff in the above-entitled cause, the defendant says:

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations in Paragraph I, and denies each and every other allegation in said complaint contained.

Third Defense

The defendant avers that it did not accept the said hops at the time tenth bale samples were taken or at any other time, but the defendant alleges that if it can be said that it did accept said hops, the defendant is not liable to the plaintiff for the price of the hops for the reason that the defendant rejected said hops within a reasonable time after it first had an opportunity to make a reasonable inspection of said hops, and for the further reason that such rejection was justified inasmuch as the said hops were not of the quality specified in the said contract between the plaintiff and the defendant, but were of such an inferior quality that the defendant was not bound to accept them.

Wherefore defendant prays judgment that the complaint of plaintiff be dismissed, and for defendant's costs.

/s/ KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for defendant.

United States of America,
District of Oregon—ss.

I, Stuart W. Hill, being first duly sworn, depose and say: That I am one of the attorneys for the defendant in the above-entitled cause; that I have read the foregoing Amended Answer and believe it to be true; that said defendant is absent from and a non-resident of the District of Oregon in which said cause is pending, and that I make this affidavit for that reason.

s/ STUART W. HILL.

Subscribed and sworn to before me this 1st day of February, 1949.

[Seal] /s/ R. M. KERR,

Notary Public for Oregon.

My Commission expires: 2/5/51.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Amended Answer and have carefully compared the same with the original thereof; and that it is a correct copy therefrom and of the whole thereof.

That the said Amended Answer in my opinion is well founded in law.

Dated, 1949.

.

Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 2, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

I find that the buyer weighed the hops and "took them in," without imposing any conditions. By the custom of the trade, this constituted acceptance and makes the buyer liable for the contract price.

Dated June 15, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 15, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was tried at Portland, Oregon, before the undersigned Judge of the above-entitled Court. Plaintiff appeared in person and by Randall B. Kester and William E. Dougherty of his attorneys,

and defendant appeared by Robert M. Kerr and Stuart W. Hill, its attorneys. Both parties waived jury trial, and the issues were tried by the Court.

It appearing that this action involved common questions of law and fact with the actions of Fred Geschwill, plaintiff, vs. Hugo V. Loewi, Inc., defendant, Civil Action No. 4082, and Kilian W. Smith, plaintiff, vs. Hugo V. Loewi, Inc., defendant, Civil Action 4083, the parties consented and the Court ordered that said three actions be tried jointly and that the evidence in any of the actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together to the extent that such evidence was pertinent, material and relevant.

The joint trial of the three actions began on January 25, 1949, and concluded on February 5, 1949. All parties to said actions offered evidence. The Court heard arguments of counsel for the respective parties, and the Court considered memorandum briefs on the facts and the law submitted by counsel for the respective parties.

The Court, being fully advised, having considered the evidence, arguments and briefs, and having handed down his memorandum of decision, now hereby makes the following

Findings of Fact:

1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and

defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of Delaware.

2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000; and this Court has jurisdiction of the subject matter, the parties and the cause of action.

3. On or about February 7, 1944, plaintiff, as seller, and defendant, as buyer, entered into the 1947 "hop contract" received in evidence herein, which contract was one of a series of similar contracts entered into between the parties at the same time relating to hop crops for several successive years. By said contract it was agreed that plaintiff would sell and defendant would buy one-half of the salable crop of fuggle and late cluster hops grown by plaintiff on a certain farm in Clackamas County, Oregon, in 1947. There is no controversy here concerning the fuggle hops which were in 1947 grown by plaintiff and accepted by defendant. The one-half of the 1947 crop of late cluster hops involved here was duly grown and raised by plaintiff on said farm.

4. By said contract defendant buyer agreed to advance to plaintiff seller, as part payment under the contract, certain sums on certain dates, and the contract provided that defendant should have a prior lien upon said hop crop for such advances. Pursuant to said contract, defendant caused plaintiff to execute and deliver to defendant a separate chat-

tel mortgage upon said 1947 hop crop, and defendant duly filed said chattel mortgage in the records of Clackamas County, Oregon. Defendant did not at any time release or discharge said mortgage of record.

5. Said contract provided in substance that if said growing crop at or before the time of picking was not in condition to produce the quality of hops called for by the contract, then the defendant buyer would have been released from its obligation to make any further advance under the contract. In 1947 there was, and defendant knew there was, widespread mildew in hop yards in the Willamette Valley in Oregon. Before and at the time of picking defendant knew that there was mildew in plaintiff's said late cluster hops and that said hops when picked and baled would in normal course show such mildew. Defendant, having such knowledge, elected to make plaintiff a further advance payment to enable plaintiff to harvest said late cluster hops. Such mildew in said late cluster hops did not thereafter become more pronounced or prevalent.

6. Defendant buyer made advance payments under the contract in a total amount which differed from that called for by the contract but which was agreed upon by the parties. Defendant reimbursed itself for all advance payments made under said contract, with respect to both the fuggle and the late cluster hops, by deducting the total of said advance payments from the amount due plaintiff for

the fuggle hops purchased by defendant from plaintiff under said 1947 contract.

7. Plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon. The time and place of such delivery was acceptable to defendant and was in accordance with the prior practice of the parties. On September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties. At that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside. Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed.

8. At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops. The parties did not agreed upon any change in or deviation from, and plaintiff did not waive, said established custom and usage. Defendant in fact

accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff as aforesaid, and defendant was obligated to pay the contract price therefor on or before October 31, 1947, but defendant did not then or thereafter pay said price or any part thereof.

9. There was no Federal price regulation in effect covering the 1947 crop of Oregon hops, and the price to be paid by the defendant buyer for said late cluster hops under said contract was the grower market price for such Oregon hops on the particular date selected by the plaintiff seller between the dates specified in said contract. The grower market price for such hops in September and October of 1947 was 85 cents a pound. Said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to defendant and which conformed to the prior practice between the parties.

10. The leaf and stem content of said late cluster hops was eleven per cent or three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947. According to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by deducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent. The parties desig-

nated the grower market price pursuant to said contract at 85 cents per pound without reference to leaf and stem content.

11. The grower market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid. Said hops weighed 37,638 pounds net, as determined by defendant. The contract price for said hops was 82 cents per pound, or a total of \$30,863.16.

12. Plaintiff duly tendered said late cluster hops to defendant in warehouse at the place specified in said contract, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for the price. Defendant did not pay said purchase price or any part thereof. (Defendant reimbursed itself for the partial advance payment out of the fuggle proceeds, as aforesaid.) Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of said purchase price.

13. When the hops were tendered to defendant and defendant had inspected the same as aforesaid, and subsequently when defendant advised plaintiff that it did not wish to take said hops as hereinafter stated, defendant did not specify any particular objection it may have had to said hops. Upon trial defendant advanced the two specific ob-

jections that said hops showed some mildew and were somewhat above average in leaf and stem content. Upon the facts neither claimed defect was material.

14. Plaintiff delivered the very hops which were covered by the contract and upon which defendant had made advance payments. Said hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by defendant under contracts containing in effect the same provisions as to quality. Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.

15. Without rejecting said late cluster hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops; and from time to time thereafter defendant suggested that said hops be sold to some other buyer. The parties hereto from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract.

16. Hops are of a perishable nature; there had been a material decline in the general market price

and demand for 1947 Oregon late cluster hops; and the hops here involved could not readily be resold. On May 7, 1948, after defendant had been in default in the payment of said price an unreasonable time, plaintiff after notice to defendant and without waiving his rights against defendant, sold said hops to another buyer at a total price of \$11,904.31, which was the best price then obtainable therefor. Defendant consented to such resale. Said resale price was properly credited against the sum then due from defendant, and the balance remaining due was as follows:

Amount due from defendant on October 31, 1947.....	\$30,863.16
Interest thereon to May 7, 1948, at 6% per annum.....	956.25

Amount due on May 7, 1948.....	\$31,819.41
Proceeds of resale on May 7, 1948...	11,904.31

Balance	\$19,915.10
---------------	-------------

No part of said balance has been paid.

Upon the foregoing findings of fact the Court has determined and does hereby make the following:

Conclusions of Law

1. Plaintiff substantially performed all of the terms and conditions of the contract between the parties on his part to be performed.

2. The property in said late cluster hops passed to defendant.

3. Defendant became obligated to pay to plain-

tiff on or before October 31, 1947, the sum of \$30,-863.16.

4. Defendant wrongfully refused to and did not perform its obligation under said contract.

5. The resale of said late cluster hops was proper, and the proceeds therefrom received by plaintiff are properly credited against the amount then due him from defendant.

6. The measure of plaintiff's recovery upon the facts here is, under Oregon law, the difference between the amount due under said contract and the amount realized from said resale.

7. Plaintiff should have judgment against defendant for \$19,915.10, with interest at the rate of six per cent per annum from May 7, 1948, until the same be paid in full, and with costs and disbursements; and judgment will be entered accordingly.

Dated this 22nd day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

Proposed form submitted by

/s/ WILLIAM E. DAUGHERTY,
/s/ RANDALL B. KESTER,
of Attorneys for Plaintiff.

Service of proposed form admitted at Portland, Oregon, this 12th day of July, 1949.

KERR & HILL,
By /s/ GERALDINE RIST,
of Attorneys for Defendant.

[Endorsed]: Filed Sept. 22, 1949.

In the United States District Court
For the District of Oregon

Civil Action No. 4158

O. L. WELLMAN,

Plaintiff,

vs.

JOHN I. HAAS, INC.,

Defendant.

JUDGMENT

The Court having found the facts in this cause specially, stated separately its conclusions of law thereon, and directed the entry of this, the appropriate judgment, it is therefore

Considered, Ordered and Adjudged that plaintiff have and recover from the defendant the sum of \$19,915.10, with interest thereon at the rate of six per cent per annum from May 7, 1948, and plaintiff's costs herein taxed at \$164.63.

Dated this 30th day of September, 1949.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Sept. 30, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that John I. Haas, Inc., a corporation, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 30th day of September, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

[Endorsed]: Filed Oct. 10, 1949.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents, that we, John I. Haas, Inc., a Delaware corporation, as principal, and Aetna Casualty & Surety Company, a Connecticut corporation, as surety, are held and firmly bound unto O. L. Wellman in the full and just sum of \$25,000.00, to be paid to the said O. L. Wellman or his certain attorney, executor, administrator, or assigns; to which payment, well and truly to be made, we bind ourselves, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of October, 1949.

Whereas, lately at a session of the District Court of the United States for the District of Oregon in a suit pending in said Court, between O. L. Wellman, as plaintiff, and John I. Haas, Inc., a Delaware corporation, as defendant, a judgment was rendered against the said defendant and the said defendant, John I. Haas, Inc., a Delaware corporation, having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, California.

Now, the condition of the above obligation is such that if the said defendant, John I. Haas, Inc., a Delaware corporation, shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award if said John I. Haas, Inc., a Delaware corporation, fails to make its plea good, then the above

obligation to be void; else to remain in full force and virtue.

JOHN I. HAAS, INC.,
a Delaware corporation,

[Seal] By /s/ ROBERT M. KERR,
Its Attorney in Fact,
Principal.

AETNA CASUALTY &
SURETY CORPORATION,
A Connecticut Corporation.

[Seal] By /s/ JAMES H. COUCH,
Its Resident Vice President,
Surety.

Attest:

/s/ H. P. ATTERBURY,
Resident Ass't Secretary.

Countersigned:

/s/ H. A. PETERSON,
Resident Agent.

Form of bond and sufficiency of surety approved,
this 10th day of October, 1949.

/s/ CLAUDE McCOLLOGH,
U. S. District Judge.

Power of Attorney

Know All Men By These Presents, that John I. Haas, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, has made, constituted, and appointed,

and by these presents does make, constitute, and appoint Robert M. Kerr, of Portland, in the State of Oregon, to be its true and lawful attorney, for it and in its name, place, and stead, to enter into, make, and execute, in an action pending in the District Court of the United States for the District of Oregon, entitled O. L. Wellman, plaintiff, v. John I. Haas, Inc., defendant, Civil Action No. 4158, a supersedeas bond, as principal, in the sum of \$25,000.00 or such other amount as may be necessary to comply with the order of the said Court fixing the amount of such bond, and to sign, seal, acknowledge, and deliver the same, in contemplation of an appeal from the judgment entered in said action on the 30th day of September, 1949.

In Witness Whereof, the said corporation has caused these presents to be signed by its officer thereunto duly authorized, and its corporate seal to be hereunto affixed, this 7th day of October, 1949.

JOHN I. HAAS, INC.,
[Corporate Seal]

By /s/ FREDERICK J. HAAS,
Its Vice President.

Attest:

/s/ WALTER RAUHN,
Secretary.

United States of America
District of Columbia—ss.

Personally appeared Frederick J. Haas, Vice President, of said corporation, signer and sealer of

the above instrument, he being thereunto duly authorized by the corporation above named, and acknowledged the same to be his free act and deed, and the free act and deed of said corporation before me, this 7th day of October, 1949.

[Seal] /s/ W. W. MATHEWS,
Notary Public, D. C.

My Commission Expires: 2/14/51.

The Aetna Casualty and Surety Company
Hartford, Connecticut

Certificate of
Authority of Resident Vice-President

Know All Men By These Presents, That James H. Couch with business address at Portland, Oregon, but without territorial restriction, has been and is hereby appointed Resident Vice-President of The Aetna Casualty and Surety Company, a corporation organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, State of Connecticut, and as such Resident Vice-President has full power and authority to sign and execute, on behalf of the Company, any and all bonds, recognizances, contracts of indemnity, or writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and all bonds, recognizances, contracts of indemnity, or writings obligatory in the nature of a bond, recognizance, or conditional undertaking signed by him,

when sealed and attested by a Resident Assistant Secretary, shall be as valid and binding upon the Company as if the same had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws:

Article IV—Section 8. The President, any Vice-President, or any Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

Article IV—Section 10. Any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or conditional undertaking shall be valid and binding upon the Company when (a) signed by the

President or a Vice-President or by a Resident Vice-President, pursuant to the power prescribed in the certificate of authority of such Resident Vice-President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

In Witness Whereof, The Aetna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 4th day of April, A.D., 1949.

THE AETNA CASUALTY AND
SURETY COMPANY,

[Seal] By /s/ J. A. SWEARINGEN,
Secretary.

State of Connecticut,
County of Hartford—ss.

On this 4th day of April, A.D., 1949, before me personally came J. A. Swearingen, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of The Aetna Casualty and Surety Company, the corporation described in and which executed the above instrument; that he

knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation and that he signed his name thereto by like authority.

Certificate No. 379950.

[Seal] /s/ ANNE V. THORNE,
Notary Public.

My Commission Expires Mar. 31, 1952.

The Aetna Casualty and Surety Company
Hartford, Connecticut

Certificate of
Authority of Resident Assistant Secretary

Know All Men By These Presents, That H. P. Atterbury, with business address at Portland, Oregon, but without territorial restriction, has been and is hereby appointed Resident Assistant Secretary of The Aetna Casualty and Surety Company, a corporation organized under the laws of the State of Connecticut, and having its principal office in the City of Hartford, State of Connecticut, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds, recognizances, contracts of indemnity, or writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and all bonds, recognizances, contracts of indemnity, or writings oblig-

atory in the nature of a bond, recognizance, or conditional undertaking sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if the same had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following provisions of the by-laws of the Company which provisions are now in full force and effect and are the only applicable provisions of said by-laws:

Article IV—Section 8. The President, any Vice-President, or any Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact, and Agents to act for and on behalf of the Company and may give any such appointee such authority as his certificate of authority may prescribe to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indemnity, and other writings obligatory in the nature of a bond, recognizance, or conditional undertaking, and any of said officers or the Board of Directors may at any time remove any such appointee and revoke the power and authority given him.

Article IV—Section 10. Any bond, recognizance, contract of indemnity, or writing obligatory in the nature of a bond, recognizance, or condi-

tional undertaking shall be valid and binding upon the Company when (a) signed by the President or a Vice-President or by a Resident Vice-President, pursuant to the power prescribed in the certificate of authority of such Resident Vice-President, and duly attested and sealed with the Company's seal by a Secretary or Assistant Secretary or by a Resident Assistant Secretary, pursuant to the power prescribed in the certificate of authority of such Resident Assistant Secretary; or (b) duly executed (under seal, if required) by one or more Attorneys-in-Fact pursuant to the power prescribed in his or their certificate or certificates of authority.

In Witness Whereof, The Aetna Casualty and Surety Company has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 4th day of April, A.D., 1949.

THE AETNA CASUALTY AND
SURETY COMPANY,

[Seal] By /s/ J. A. SWEARINGEN,
Secretary.

State of Connecticut,
County of Hartford—ss.

On this 4th day of April, A.D., 1949, before me personally came J. A. Swearingen, to me known, who, being by me duly sworn, did depose and say: that he is Secretary of The Aetna Casualty and

Surety Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of his office under the by-laws of said corporation and that he signed his name thereto by like authority.

Certificate No. 379969.

[Seal] /s/ ANNE V. THORNE,
Notary Public.

My Commission Expires Mar. 31, 1952.

[Endorsed]: Filed Oct. 10, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of Appeals and the appeal docketed in the Court of

Appeals be and the same hereby is extended to and including the 17th day of December, 1949.

Dated this 18th day of November, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Nov. 21, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
DEFENDANT INTENDS TO RELY ON
APPEAL

The defendant and appellant, John I. Haas, Inc., proposes on its appeal to the Court of Appeals for the Ninth Circuit to rely on the following points as error:

1. The court erred in finding that by the agreement of February 7, 1944, the plaintiff agreed to sell and the defendant agreed to buy one-half of the salable crop of cluster hops grown by the plaintiff on his premises in Clackamas County, Oregon, in 1947, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

2. The court erred in finding that before and at the time of picking, the defendant knew that there was mildew in the plaintiff's cluster hops and that said hops, when picked and baled, would in normal course show such mildew, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

3. The court erred in finding that the defendant, having such knowledge, elected to make plaintiff a further advance payment to enable the plaintiff to harvest said cluster hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

4. The court erred in finding that such mildew in said cluster hops did not thereafter become more pronounced or prevalent, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

5. The court erred in finding that the plaintiff duly raised, harvested, cured, and baled said crop of 1947 cluster hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

6. The court erred in finding that on September 25, 1947, the bales of hops which constituted the said one-half of the plaintiff's 1947 cluster hops were received, inspected, sampled, marked, and weighed by the defendant, and were identified, appropriated to the contract, and set aside, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

7. The court erred in finding that the plaintiff duly performed all of the terms and conditions of said contract on his part to be performed, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

8. The court erred in finding that at the time said contract was entered into and at the time of the delivery and weighing in of said cluster hops, there was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

9. The court erred in finding that the parties did not agree upon any change in or deviation from, and the plaintiff did not waive, said established custom and usage, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

10. The court erred in finding that the defendant, in fact, accepted said one-half of the 1947 crop of cluster hops produced by the plaintiff, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

11. The court erred in finding that the defendant was obligated to pay the contract price therefor on or before October 31, 1947, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

12. The court erred in finding that the grower's market price for such hops in September and October, 1947, was 85 cents a pound, and in basing the

judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

13. The court erred in finding that the growers' market price of 85 cents a pound for said cluster hops was selected by the plaintiff and communicated to the defendant in a manner and at a time which was acceptable to the defendant and which conformed to the prior practice between the parties, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

14. The court erred in finding that the leaf and stem content of said cluster hops was three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

15. The court erred in finding that according to the general custom and usage of the trade in that year, which was known to the parties, such leaf and stem content was compensated for by deducting 1 cent per pound for each one per cent that the leaf and stem content exceeded eight per cent, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

16. The court erred in finding that the parties designated the grower's market price pursuant to

said contract at 85 cents per pound without reference to leaf and stem content, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

17. The court erred in finding that the grower's market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

18. The court erred in finding that the contract price for said hops was 82 cents per pound, or a total of \$30,863.16, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

19. The court erred in finding that when the defendant advised the plaintiff that it did not wish to take said hops, the defendant did not specify any particular objection to said hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

20. The court erred in finding that upon the trial, the defendant advanced the two specific objections that said hops showed some mildew and were somewhat above average in leaf and stem content, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

21. The court erred in finding that upon the facts, neither claimed defect was material, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

22. The court erred in finding that the plaintiff delivered the very hops which were covered by the contract, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

23. The court erred in finding that said hops were of substantially the average quality of cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing in effect the same provisions as to quality, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

24. The court erred in finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

25. The court erred in finding that said hops, upon tender and delivery, substantially conformed to the quality provisions of said contract, and in

basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

26. The court erred in finding that the defendant did not reject said cluster hops prior to May 3, 1948, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

27. The court erred in finding that there had been a material decline in the general market price and demand for 1947 cluster hops, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

28. The court erred in finding that the cluster hops here involved could not readily be resold, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

29. The court erred in finding that the defendant was in default in the payment of the purchase price, and in basing the judgment thereon, such finding being clearly erroneous and unsupported by substantial evidence.

30. The court erred in deciding that the plaintiff substantially performed all of the terms and conditions of the contract between the parties on his part to be performed.

31. The court erred in deciding that the property in said cluster hops passed to the defendant.

32. The court erred in deciding that the defendant became obligated to pay to the plaintiff on or before October 31, 1947, the sum of \$30,863.16.

33. The court erred in deciding that the defendant wrongfully refused to and did not perform its obligation under said contract.

34. The court erred in deciding that the measure of the plaintiff's recovery, upon the facts in this case, is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale of the plaintiff's hops.

35. The court erred in failing and refusing to apply the provision in said contract of February 7, 1944, which fixed and determined the measure of damages as the difference between the contract price of the hops the defendant was obligated to accept, and the market value thereof.

36. The court erred in deciding that the judgment against the defendant should include interest at the rate of six percent per annum from May 7, 1948, to the date of judgment.

37. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: Did you deliver hops under those contracts to John I. Haas, Inc.?

Answer: I did.

38. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: Did they take hops that were affected by downy mildew?

Answer: Yes, with the exception of 108 bales that were relatively free from mildew, not entirely, but relatively free from mildew.

39. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: What settlement did you make with John I. Haas, Inc., or what price arrangement did you make with John I. Haas, Inc., on your 108 bale lot?

Answer: They deducted 1 cent a pound for 1 percent leaf and stem content over 8 percent.

40. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: What arrangement did you make to close out the other parts of your crop on the 45-cent fixed-price contract? Did they take all those?

Answer: Yes.

41. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: Did they raise any question at all about the quality?

Answer: I believe that they deducted—I can't answer now definitely. The hops were accepted.

42. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: On the open-end contract for the fuggles, did they take all those at the regular price?

Answer: At the regular price, 90 cents a pound.

43. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Glatt: How about the open-end contract on the clusters? Did they take those?

Answer: Yes, they did.

44. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: In the hop itself, what is the substance that makes the hop useful for brewing beer?

Answer: They use what they call the lupulin.

45. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: If mildew were to touch the outside petals and turn them reddish or orange colored, would that normally affect the lupulin on the inside of the hop?

Answer: Not if it is in the later season. I

imagine if it is in the real early stage it wouldn't make no hop, but later on it don't affect it at all.

46. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Geschwill during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What was the custom generally, in the business with respect to whether weighing in was an acceptance of hops?

Answer: That was the custom; when they was weighed, when they went over the scale and there was nothing wrong with the hops.

47. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: Is that lupulin what the hop is used for in making beer?

Answer: That is what I understand, the main property of it.

48. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of Fred Geschwill v. Hugo V. Loewi, Inc., Civil Action No. 4082: What is the understanding in the hop trade generally as to what use of the hop is made in making

beer? That is, insofar as it is common knowledge in the hop business.

Answer: It is my general understanding that the hop is used primarily for flavor and aroma.

49. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of *Fred Geschwill v. Hugo V. Loewi, Inc.*, Civil Action No. 4082: What portion of the hop does that aroma come from?

Answer: From the lupulin, primarily, as I understand.

50. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of *Fred Geschwill v. Hugo V. Loewi, Inc.*, Civil Action No. 4082: If there was an attack of down mildew sufficient to discolor the petals, make some of the petals turn a slightly reddish tinge, but not enough to get inside the petals, would that ordinarily affect the lupulin quality?

Answer: I never thought so. That, again, is a very debatable question. As you know, we have 1,200 or 1,400 brewers in the United States or whatever it may be—I do not have the number. Brewmasters, of course, do not—they might use them or buy them even though they showed that discoloration.

51. The court erred in admitting evidence on behalf of the plaintiff as follows:

Question of plaintiff's attorney propounded to witness Walker during the trial of *Fred Geschwill v. Hugo V. Loewi, Inc.*, Civil Action No. 4082: Even with some discoloration of the petals, the hop is usually considered marketable?

Answer: Yes, I would consider them so.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,

Attorneys for
Defendant-Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Statement of Points on which Defendant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 5, 1949.

STUART W. HILL,
Of Attorneys for
Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 5, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Defendant, John I. Haas, Inc., hereby designates for inclusion in the record on appeal the following portions of the record, proceedings, and evidence:

1. Complaint.
2. Amended answer.
3. Findings of fact and conclusions of law.
4. Memorandum of decision.
5. Judgment.
6. Notice of appeal.
7. Supersedeas bond.
8. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949.
9. Statement of points on which defendant intends to rely on appeal.
10. This designation of contents of record on appeal, and all counterdesignations or further designations.
11. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case.

12. The following exhibits:

- (a) Plaintiff's exhibits having the following numbers: 1, 1-A, 2, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-Y, 4, 5, 6, 7, 8, 9, 10, 16.
- (b) Defendant's exhibits having the following numbers: 11-A, 11-B, 11-C, 11-D, 11-E, 11-F, 11-G, 11-H, 11-I, 11-J, 11-K, 11-L, 11-M, 11-N, 12, 13, 14, 15, 18.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for
Defendant-Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of Contents of Record on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated, 1949.

STUART W. HILL,
Of Attorneys for
Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 5, 1949.

[Title of District Court and Cause.]

ORDER FOR
TRANSMITTAL OF EXHIBITS

On motion of the defendant and appellant, John I. Haas, Inc.,

It Is Ordered That the Clerk of this court forward to the United States Court of Appeals for the Ninth Circuit, in connection with the appeal of the above-entitled cause, all of the original documentary exhibits in accordance with the usual practice of this court in regard to the safekeeping and transportation of original documentary exhibits.

It Is Further Ordered That the Clerk of this court be and he hereby is authorized to permit Kerr & Hill, attorneys of record for the defendant and appellant, to withdraw all of the other exhibits in this cause from the office of the Clerk of this court in order that they may be shipped to the United States Court of Appeals for the Ninth Circuit.

Dated this 7th day of December, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Dec. 7, 1949.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL CONTENTS OF RECORD ON APPEAL

O. L. Wellman, plaintiff and appellee, hereby designates the following additional portions of the record, proceedings and evidence in this cause to be included in the record on appeal herein to the United States Court of Appeals for the Ninth Circuit:

1. Plaintiff's Exhibits 3-X, 3-Z and 17.

2. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records on appeal to the United States Court of Appeals for the Ninth Circuit from the United States District Court for the District of Oregon in Civil Action No. 4082, Fred Geschwill, plaintiff-appellee vs. Hugo V. Loewi, Inc., a corporation, defendant-appellant, and in Civil Action No. 4083, Kilian W. Smith, plaintiff-appellee, vs. Hugo V. Loewi, Inc., a corporation, defendant-appellant. (Those two actions involve common questions of law and fact with this action; and on trial the parties to all three actions consented, and the District Court ordered, that the three actions be tried jointly and that the evidence in any of said actions should be deemed to have been taken and heard and should be considered in each of the actions so

tried together to the extent that such evidence was pertinent, material and relevant.)

Dated at Portland, Oregon, this 14th day of December, 1949.

ROY F. SHIELDS,
/s/ RANDALL B. KESTER,
/s/ WILLIAM E. DAUGHERTY,
Of Attorneys for
Plaintiff-Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 14, 1949.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL AND DOCKETING
APPEAL

The Motion of the defendant for extension of time for filing record on appeal and docketing appeal having been brought on for hearing and it appearing to the court that the facts set forth therein are true, and the court being fully advised in the premises,

It Is Ordered that the time within which the record on appeal may be filed in the Court of

Appeals and the appeal docketed in the Court of Appeals be and the same hereby is extended to and including the 31st day of December, 1949.

Dated this 15th day of December, 1949.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

[Endorsed]: Filed Dec. 15, 1949.

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

July 9—Filed complaint.

July 9—Issued summons—to marshal.

July 13—Filed summons with return.

Aug. 2—Filed defendant's motion for more definite statement.

Aug. 23—Entered order reserving motion until pre-trial conference. Fee.

Sept. 2—Filed answer.

Dec. 13—Entered order setting for Pre-trial Conf. on Jan. 17, 1949. Fee.

Dec. 15—Entered order setting for trial on Jan. 25, 1949. McC.

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Jan. 14—Filed Depositions of Clifford F. Noakes and Gilbert Elwin Davis.

Jan. 14—Filed Deposition of O. L. Wellman.

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Jan. 17—Record of pre-trial conference. McC.

Jan. 24—Filed deposition of Harold W. Ray.

Jan. 28—Issued subpoena and 2 copies to atty. for plaintiff.

Jan. 28—Filed subpoena and 4 copies to atty. for plaintiff.

Jan. 28—Record of trial before court. McC.

Jan. 29—Record of trial before court. McC.

Feb. 1—Record of trial before court. McC.

Feb. 2—Record of trial before court and order to file amended answer. McC.

Feb. 2—Filed amended answer.

Feb. 3—Record of further trial before court; arguments and order allowing ptff. to Feb. 17 to submit brief and deft. to March 2, 1949, and order continuing for further trial to Feb. 5, 1949. McC.

Feb. 5—Record of further trial before court. McC.

May 17—Filed defts. reply brief.

June 15—Filed ptffs. reply memorandum.

June 15—Filed memorandum of decision (for ptff). McC.

July 25—Entered order setting hearing in settlement of Findings of Fact and Conclusions of Law for Sept. 12, 1949. McC.

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Sept. 7—Lodged Findings of Fact proposed by deft.

Sept. 13—Filed additional objections to Findings of Fact and Conclusions of Law proposed by plaintiff.

Sept. 7—Filed objections to F & F & C of Law proposed by ptff.

Sept. 19—Record of hearing on Findings of Fact and Conclusions of Law argued and reserved. McC.

Sept. 22—Filed memorandum of decision (for ptff.) McC.

Sept. 22—Filed and entered Findings of Fact and Conclusions of Law. McC.

Sept. 30—Filed deft's. objections to form of proposed judgment.

Sept. 30—Filed and entered judgment for ptff. for \$19,915.10 with interest at 6% from May 7, 1948. McC.

Sept. 30—Entered judgment in Lien Docket.

Oct. 8—Filed plaintiff's cost bill.

Oct. 10—Filed stipulation concerning amount of supersedeas bond.

Oct. 10—Filed and entered order fixing amount of supersedeas bond. McC.

1949

Oct. 10—Filed notice of application for taxation of costs.

Oct. 10—Filed supersedeas bond.

Oct. 10—Filed notice of appeal by defendant.

Oct. 11—Mailed copy of notice of appeal to Maguire, Shields, Morrison & Bailey.

Nov. 15—Filed in duplicate, transcript of testimony.

Nov. 18—Entered order extending time for filing record on appeal to December 17, 1949. McC.

Nov. 21—Filed above order.

Nov. 21—Filed motion for above order.

Dec. 5—Filed statement of points.

Dec. 5—Filed designation of record on appeal.

Dec. 7—Filed and entered order for transmittal of exhibits. McC.

Dec. 14—Filed appellee's designation of record on appeal.

Dec. 15—Filed and entered order extending time to file appeal. McC.

United States District Court
District of Oregon

Civil No. 4158

O. L. WELLMAN,

Plaintiff,

vs.

JOHN I. HAAS, INC., a corporation,

Defendant.

Friday, January 28, 1949.

Before: Honorable Claude McColloch,
Judge.

Appearances:

MR. RANDALL B. KESTER
MR. WILLIAM E. DOUGHERTY
MAGUIRE, SHIELDS, MORRISON &
BAILEY

Attorneys for Plaintiff.

MR. ROBERT M. KERR
MR. STUART W. HILL,
Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Mr. Kester: If the Court please, there has been a number of exhibits marked and identified previously in connection with the depositions similar to the other cases, and, as in the other cases, I will offer them all as a group.

The Court: Whatever has been offered for pre-trial and identified will be admitted here subject to the objections heretofore stated and hereafter to be stated prior to submission.

(The following exhibits were thereupon offered and received in evidence.)

Plaintiff's Exhibit 1—Sheaf of documents, the first of which is entitled "Hop Inspection Certificate" dated October 9, 1947, and including canceled check, receipts, weight slips, etc.

Defendant's Exhibit 1-A—Hop contract dated February 7, 1944, between O. L. Wellman and John I. Haas, Inc.

Plaintiff's Exhibit 2—Weight slip covering 193 bales, Lot 51.

Plaintiff's Exhibit 3-A—Telegram dated Hillsboro, Oregon, August 13, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-B—Carbon copy of letter dated August 14, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-C—Letter dated August 19, 1947, John I. Haas, Inc., to A. J. Ray & Son. [2*]

Plaintiff's Exhibit 3-D—Carbon copy of letter dated September 10, 1947, A. J. Ray & Sons to John I. Haas, Inc.

Plaintiff's Exhibit 3-E—Hop Sample Advice,

* Page numbering appearing at top of page of original Reporter's Transcript.

dated September 15, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-F——Telegram dated September 18, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-G——Telegram dated September 24, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-H——Pencil copy of telegram, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-I——Telegram dated Hillsboro, Oregon, September 24, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-J——Hop Sample Advice, dated September 26, 1947. A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-K——Carbon copy of letter dated September 29, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-L——Letter dated September 29, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-M——Letter dated October 1, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-N——Carbon copy of letter dated October 2, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-O——Telegram dated Hills-

boro, Oregon, October 4, 1947, A. J. Ray & Son to John I. Haas, Inc. [3]

Plaintiff's Exhibit 3-P——Letter dated October 4, 1947, from John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-Q——Carbon copy of letter dated October 7, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-R——Telegram dated October 10, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-S——Letter dated October 10, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-T——Carbon copy of letter dated October 11, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-U——Letter dated October 18, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-W——Letter dated October 30, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 3-V——Carbon copy of letter dated October 22, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-X——Carbon copy of letter dated November 1, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-Y——Letter dated November 1, 1947, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 3-Z—Telegram dated Hillsboro, Oregon, May 8, 1948, A. J. Ray & Son to John I. Haas, Inc.

Plaintiff's Exhibit 4—Telegram dated September 30, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 5—Telegram dated September 25, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 6—Telegram dated September 26, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 7—Telegram dated September 22, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 8—Telegram dated August 13, 1947, John I. Haas, Inc., to A. J. Ray & Son.

Plaintiff's Exhibit 9—Copy of Crop Mortgage and Agreement, dated February 7, 1944, between Butte Creek Orchards by Otto Wellman and S. S. Steiner, Inc.

Plaintiff's Exhibit 10—Photostatic copy of chattel mortgage, dated February 21, 1947, between O. L. Wellman and John I. Haas, Inc.

Defendant's Exhibit 11-A—11-N—Hop Samples.

Defendant's Exhibit 12—Carbon copy of letter dated September 25, 1947, A. J. Ray & Son to R. M. Walker, Independence, Oregon.

Defendant's Exhibit 13—Hop Market Review, dated November 4, 1946.

Defendant's Exhibit 14——Hop Market Review, dated November 17, 1947.

Defendant's Exhibit 15——Hop Market Review, dated November 23, 1948.

Plaintiff's Exhibit 16——Carbon copy of Weight Slip, S. S. Steiner, Inc. (See Page 351.) [5]

Plaintiff's Exhibit 17——Photostatic copy of records of John I. Haas, Inc., covering hop purchases and sales. (See Page 413.)

Defendant's Exhibit 18——Letter dated September 16, 1947, John I. Haas, Inc., to A. J. Ray & Son. (See Page 422.)

O. L. WELLMAN

the Plaintiff herein, was thereupon produced as a witness in his own behalf and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Otto Wellman?

A. Yes, sir.

Q. You are the plaintiff in this case, No. 4158?

A. Yes, sir.

Q. Where do you live, Mr. Wellman?

A. In Mt. Angel.

Q. What is your present occupation?

A. Just not much of anything at the present time.

(Testimony of O. L. Wellman.)

Q. Have you sold the hop ranch which you owned? A. Yes, I sold my farm. [6]

Q. How long were you engaged in the hop business? A. Since 1930.

Q. What was the place that you operated?

A. Butte Creek Orchards.

Q. Butte Creek Orchards? A. Yes.

Q. Where was that located?

A. About a mile down the river from Monitor in Clackamas County.

Q. In Clackamas County? A. Yes.

Q. What is the size of that ranch?

A. It is 225 acres in the farm.

Q. Is it all in hops?

A. No, not quite.

Q. How many hops do you have?

A. I would say around about 160 acres.

Q. Did you have both fuggles and clusters?

A. Yes, that is right.

Q. How much of fuggles and how much of clusters?

A. I think there is 120 acres of late clusters and 40 acres of fuggles.

Q. Has that been the size of the yard during the past years?

A. No, it was not that large in the beginning.

Q. In 1947 was it that same size?

A. It was that acreage in '47. [7]

Q. Had you had prior experience in the hop business before 1930? A. No, I haven't.

(Testimony of O. L. Wellman.)

Q. Approximately how many bales would you harvest from that ranch per year on an average?

A. The average on the full planting was around —oh, somewhere near a thousand bales a year.

Q. About how many bales of fuggles and how many of clusters, generally speaking?

A. Oh, somewhere from 240 to 325 bales of fuggles, and the balance late clusters.

Q. I will hand you what is marked Exhibit 1-A, which is the contract involved in this case, your contract with John I. Haas, Inc., which was entered into on the 7th of February, 1944.

A. Yes, that is right.

Q. What is the fact as to whether or not there was a series of contracts of the same date covering subsequent crops?

A. It was a five-year term contract.

Q. A five-year term contract?

A. Yes, sir, five years.

Q. Did you have a separate contract for each year? A. Yes.

Q. Were they all signed at the same time in 1944? A. Yes.

Q. Did you have any additional contracts or agreements executed [8] each year thereafter with respect to that crop? A. No.

Q. Particularly, were you required to sign a separate chattel mortgage each spring for that crop?

(Testimony of O. L. Wellman.)

A. I don't remember whether it was each year or every two years.

Q. Every two years, I guess. I will hand you this Exhibit 10 and ask you if that is the chattel mortgage which you signed on February 21st, 1947, with respect to the 1947 crop? That is a photo-static copy from the records of Clackamas County.

A. The printing is kind of small, but it is my signature there.

Q. Now, the contract in this case appears to provide for one-half of the salable crop of both fuggles and late clusters. What was the situation with respect to the other half of the crop?

A. The other half was contracted with S. S. Steiner Company.

Q. S. S. Steiner. So that between Haas and Steiner they had your entire crop under contract?

A. They split the crop.

Q. Now, what was the method customarily used for dividing up a crop in that way?

A. One got the even and the other got the odd number of bales.

Q. I see. Where were those numbers customarily assigned? Were those numbers that were put on in the warehouse?

A. The warehouse attended to those. [9]

Q. The warehouse numbers? A. Yes.

Q. That was the place where the numbering—

A. The warehouse done the numbering and the dividing.

(Testimony of O. L. Wellman.)

Q. Now, over how long a period of time had you dealt with John I. Haas, Inc.?

A. If I recollect right, I sold them the first lot of hops in 1934.

Q. Did you deal with them from 1934 on up to the time of this contract? A. That is right.

Q. Until the 1947 contract?

A. That is right.

Q. With whom were your dealings carried on with John I. Haas? That is, whom did you deal with? A. With the Salem office.

Q. With the Salem office?

A. Yes, that is right.

Q. In whose name was the Salem office?

A. Mr. Noakes.

Q. That is Clifford Noakes?

A. That is right.

Q. In what name did he carry on the business? Whom did he work for? A. A. J. Ray. [10]

Q. A. J. Ray & Son? A. That is right.

Q. And the main office of A. J. Ray & Son was in Hillsboro? A. Hillsboro.

Q. And this is Mr. Ray, who has previously testified here? A. Yes.

Q. You mentioned Mr. Noakes. Who was Mr. Noakes in that organization?

A. I think he is manager of the Salem office.

Q. The manager of the Salem office?

A. That is right.

(Testimony of O. L. Wellman.)

Q. Was there anyone else there that you dealt with?

A. Well, the field man that come out mostly to see me always was Gilbert Davis.

Q. Gilbert Davis. A. Yes.

Q. Did you ever have any dealings with any other officer or representative of John I. Haas other than Mr. Ray, Mr. Noakes and Mr. Davis?

A. It was mostly always with Gilbert Davis and Cliff Noakes.

Q. Davis and Noakes mostly? A. Yes.

Q. Did you deal with Mr. Ray at any time with respect to this particular contract in the growing season of 1947? A. No, I didn't. [11]

Q. All your business was carried on with Noakes and Davis? A. That is right.

Q. Now, in 1947 what was your total production of both fuggles and clusters? Do you recall the figure?

A. I think the figures are there: 630, the complete lot. That is fuggles and lates.

Q. 244 bales of fuggles and 386 of clusters?

A. That is right.

Q. And of that lot one-half of each was to go to Steiner and the other half to Haas?

A. That is right.

Q. I notice that this contract, unlike the others that have been referred to here, does not contain any reference to leaf-and-stem content. What was the practice between yourself and John I. Haas,

(Testimony of O. L. Wellman.)

Inc., during the prior years of this set of contracts with respect to leaf-and-stem content?

A. I had the figures that I looked up the other night, and I think there was one year that showed where the OPA ceiling price was 64 cents, and the market slip showed 62½ paid, so there must have been a reduction—I think the leaf-and-stem content was 10 percent that year. I think it was the '44 crop.

Q. That was in the year '44 they made a deduction for leaf-and-stem content?

A. I think they did.

Q. Do you recall any other year that they made a deduction for [12] leaf-and-stem content?

A. That is the only one that I had a record of.

Q. Do you know on what basis that deduction was made? Did the OPA have a scale of its own?

A. I think it was three-quarters of a cent per point over 8.

Q. After the OPA regulations went out of effect, has Haas ever made a deduction for leaf-and-stem content on your crop?

A. I would have to look that up. I don't think so.

Q. With respect to the 1947 fuggle crop, do you recall—I think the exhibits are here, but if I may refresh your memory, the pick on the fuggles was 9 percent and the pick on the clusters was 11 percent in 1947; is that correct?

A. I think the figures are there to prove that.

(Testimony of O. L. Wellman.)

Mr. Kester: Will Counsel agree with that?

Mr. Kerr: Yes.

The Witness: The Department of Agriculture's statement is there, I think.

Q. (By Mr. Kester): In taking your fuggle crop in 1947 did they make any deduction for the 9 percent pick or did they pay you the full market price for the fuggles?

A. They paid me the 90 cents for the fuggles.

Q. The 90 cents. Now, in your prior years of dealing with John I. Haas, Inc., have they ever before 1947 raised any objection to the quality of your hop crop?

A. No. We have never had a bale rejected or turned down in [13] all our dealings.

Q. They always took the crop as it came?

A. Yes.

Q. In prior years had you ever had any difficulty with mildew or other things that might affect hops?

A. Yes, I have had several severe attacks of mildew.

Q. When did you have other attacks of mildew? A. In '36 and '41.

Q. How did the mildew in those years compare with mildew in 1947?

A. Of course, in '36 I had 40 acres of early clusters, and I think off the 40 acres we only got 60-some bales of early clusters, off the 40 acres. And I don't remember just exactly what the late

(Testimony of O. L. Wellman.)

crop was, but something like four or five hundred bales, if I remember right.

Q. Was that a more serious or a less serious attack of mildew than you had in '47?

A. It was on the early hops, but the lates it was not as severe.

Q. How about in '41?

A. '41 was the smallest crop I ever raised on the farm.

Q. Small because of mildew, you mean?

A. Of mildew damage.

Q. Did Haas take in 1941 hops that had mildew damage?

A. Well, I sold every one of those hops. Of course, the mildew [14] attack was early.

Q. Did you harvest hops that had some apparent mildew on them? A. Yes.

Q. Did they take those under this same contract?

A. Yes, sir—that contract was not in effect that year.

Q. Oh, that was '41. Pardon me. Did you have a similar contract with them at that time?

A. No, I think that was an open——

Q. That was an open sale?

A. Open sale, if I remember.

Q. Did you have any other contract with Haas up to this one of 1944?

A. I don't know whether some of those deliveries

(Testimony of O. L. Wellman.)

were on contracts. Mr. Ray could probably tell. I don't recall. Mr. Ray would have that.

Q. How about the 1944 crop itself? How was it?

A. That was one of the largest crops I have ever raised.

Q. How was it with respect to mildew or mold or other things of that nature?

A. The mold was very bad in '44.

Q. The mold was bad? A. Black mold.

Q. Did Haas take hops that had mold on them in '44? A. Yes, sir.

Q. Did they take hops that had mildew on them in '44? [15]

A. Well, the mildew didn't show as much as '47.

Q. You didn't have as much mildew as in '47?

A. No.

Q. Now, in 1947 about when did the mildew appear in the vicinity of your hopyard?

A. Oh, I would say the latter part of July or the beginning of August.

Q. At that time were the hops on your vines pretty well set or were they maturing?

A. Well, they varied. Some were in the bloom and some were in the burr.

Q. Would you state what your cultivation and care consisted of during the growing season in 1947? What did you do for the crop?

A. I worked it just like I did any other year.

Q. Were you irrigating any of those hops?

A. No, we didn't irrigate.

(Testimony of O. L. Wellman.)

Q. You did not irrigate?

A. No, we didn't in '47.

Q. Did you dust or spray?

A. Yes, right from spring.

Q. About how often would you say?

A. Oh, I wouldn't say. Some yards probably nine, ten, up to eleven times, certain yards; some of them not as often. It just depended on the condition of the yards. [16]

Q. Did you have some mildew apparently in your yard in 1947? A. Yes.

Q. Now, could you give us the approximate picking dates of your fuggles and your clusters?

A. I wouldn't know exactly, but it would seem to me like it was around the 21st or 22nd of August when we finished. It could have been the 23rd or 24th. I know we had a few days' layoff between the early and late hops.

Q. When did you start harvesting the clusters?

A. The beginning of September.

Q. About the 1st of September?

A. Or the latter part of August. I forget. I think it was a day or so in August, but I would have to look up the dates exactly.

Q. Incidentally, were your hops machine-picked or hand-picked?

A. No, they were hand-picked.

Q. What was your experience with respect to pickers in 1947?

(Testimony of O. L. Wellman.)

A. Well, that is the first time I ever had to run trucks to haul pickers, in '47. It was my first experience in hauling pickers from town.

Q. Where did you haul pickers from?

A. I contracted with another grower that had early hops, too, and he hauled them from—mostly from Burnside here, at the employment office here in Portland.

Q. What was the quality of pickers that you were able to get [17] in that manner?

A. The poorest I have ever had.

Q. Were you able to exercise very much control over the picking that they did?

A. Well, I had to get the State Police in there one day to help me. Our crew just couldn't handle them.

Q. What is the fact as to whether or not you were able to keep them picking properly, picking well and cleanly?

A. Well, in plain English, you would can a bunch one day and hire another crew the next day, and the second one was probably worse than the first one.

Q. Did you take measures to try to get them to pick cleanly?

A. I done everything that I could.

Q. Do you know now approximately what price you were paying for pickers?

A. I paid 5 cents a pound on the lates, and it probably—the man hauling them, the hauling cost

(Testimony of O. L. Wellman.)

was another cent, so it probably run me around six cents on the lates.

Q. Now, did you receive advances from John I. Haas under this contract of 1944?

A. Yes, sir.

Q. Do you recall now the total amount of those advances?

A. No, I wouldn't know offhand.

Mr. Kester: I think perhaps we can stipulate for the record that there were four advances of \$5,000 each, one made on March [18] 1st, 1947, one on May 1st, one on August 14th, and one on September 10th.

Mr. Kerr: We will so stipulate.

Mr. Kester: Those figures are taken from the records here.

Q. So that you had a total of \$20,000 in advances from them at that time?

A. I think that is right.

Q. Now, tell us what the first advance of March 1st, \$5,000, would go for. What was the necessity for that?

A. Well, that is about the time you start re-planting and fertilizing.

Q. Then on May 1st another \$5,000. What would that be for?

A. Well, that is about the time we started twinning.

Q. Stringing the yard?

A. Yes, that is right.

(Testimony of O. L. Wellman.)

Q. And August 14th, \$5,000 advance. What would that be for?

A. That is just about the time of the fuggle harvest.

Q. That would be for picking fuggles?

A. That would be for picking fuggles.

Q. And an advance September 10th of \$5,000. That would be for picking the clusters?

A. Picking the late clusters.

Q. Did you have any conversation with any representative of John I. Haas with respect to selecting a grower's market price [19] under this contract? A. Yes.

Q. Would you state approximately when and where that conversation was.

A. I think it was the 12th day of September, 1947.

Q. About the 12th of September? A. Yes.

Q. Where was that? A. In Salem.

Q. And with whom did you talk?

A. Wait a minute. I don't know just exactly whether that was at Salem or when one of the boys was down—you know, it is several years ago.

Q. Did you have a telephone conversation with Mr. Noakes with respect to the price?

A. No, I didn't.

Q. To refresh your recollection, didn't you call Mr. Noakes and discuss a price of 85 cents and 90 cents?

(Testimony of O. L. Wellman.)

A. Maybe Mr. Noakes could remember that, whether that was telephone or personal.

Q. In any event, did you have a conversation with Mr. Noakes? A. Yes, I did.

Q. What was said at that time with respect to selecting the price?

A. We agreed on the market of 85 for late clusters and 90 cents [20] on the fuggles.

Q. Was that the market price at that time?

A. Yes, it was.

Q. Was anything put in writing with respect to that selection of price?

A. No, it wasn't, because I asked Mr. Noakes whether he wanted it in writing, the way the contract stated, and he stated it wasn't necessary.

Q. Did you offer to put it in writing?

A. Yes, I wanted it in writing. I asked for it in writing. And he says, "Well, that is okeh." He says, "The contract states it should be in writing, but," he said—He waived it.

Q. Now, where did you deliver the hops? What warehouse were they put in?

A. At Schwab's at Mt. Angel.

Q. Both the fuggles and the lates?

A. Yes, sir.

Q. Do you know the approximate dates on which those were delivered? For instance, had they been delivered at the time you had the conversation with Noakes about selecting the price?

A. Not all of them. The fuggles were, but not

(Testimony of O. L. Wellman.)

the late clusters. Some of the late clusters were, but not all of them.

Q. About how long afterwards were the rest of the clusters delivered to the warehouse?

The Court: We will take the afternoon recess.

(Short recess.) [21]

Q. Going back for a moment to the time of picking, Mr. Wellman, did representatives of John I. Haas come out to your hopyard during the picking season? A. Yes, several times.

Q. Did they see the way in which the hops were being picked?

A. I don't know whether they were in the yard during the time—during the picking of the lates or not. They were there before and during picking, but I don't remember whether they went into the field to examine the hops in the field or not.

Q. Did you dry them on your own place there?

A. Yes.

Q. When the fuggle-picking advance was made on August 14th, how was that check delivered to you? Did someone bring it out to your place or was it mailed? A. Mr. Davis brought it.

Q. Mr. Davis brought it out? A. Yes.

Q. And at that time were you in the process of picking the fuggles or had you started yet, do you remember, on August 14th?

A. I couldn't say whether we were picking or

(Testimony of O. L. Wellman.)

started sometime later; I know it was just about at picking time.

Q. Did you have a conversation with him at that time? A. Oh, yes.

Q. Did you have a conversation with him about your crop, do you remember? [22]

A. Oh, yes.

Q. Did you discuss the extent of mildew in your yard? A. Yes.

Q. At the time the cluster advance was made on September 10th, was that brought to you by some one person? A. Mr. Davis.

Q. Mr. Davis again? A. Yes.

Q. At that time did you discuss the crop conditions in your yard? A. Yes, we usually do.

Q. Did you discuss the extent of the mildew?

A. Yes.

Q. Did he at that time look at the hops, either in the house or in the yard?

A. On what date was that?

Q. September 10th, when he brought you the check for picking advances?

A. Yes, and he also took some samples.

Q. He took samples at that time? A. Yes.

Q. Some clusters had already been baled at that time?

A. Yes, we baled out a few bales at different points in different yards to get an idea of what they would look like.

(Testimony of O. L. Wellman.)

Q. Was that the first sampling during the picking of your [23] clusters?

A. No, I think he took one or so previous to that.

Q. Were samples taken during the picking in the usual manner—in a similar manner? A. Yes.

Q. Did you ever discuss with Mr. Davis or Mr. Noakes the matter of trying to pick selectively?

A. Yes, I mentioned it to Mr. Noakes.

Q. What is the fact as to whether or not you tried to have the hops picked selectively?

A. I had a very select group of local pickers that I have had ever since the beginning of the farm and I think two or three days prior to the main harvest I took them down at the lower end of one yard and tried it.

Q. How did it work? A. Just didn't work.

Q. Why was that? A. Well, you see——

Q. Why was that? Why isn't that a practical means of picking?

A. You would have to take every hop and you would have to pick it singly and turn it around and see if there was any mildew on it or not; just couldn't be done.

Q. Would that add to your picking costs if you attempted to do that?

A. You would have to get a couple of dollars a pound to do that. [24]

Q. That was with local pickers? A. Yes.

Q. Would it be even advisable to do anything

(Testimony of O. L. Wellman.)

like that when you had to bring in pickers by the truckload?

A. If you couldn't do it with selected people, you certainly couldn't do it with the others.

Q. When you had the conversation with Mr. Noakes about the selection of the price, do you know if he had taken other samples beyond the ones you have already mentioned?

A. If I remember right, Clifford was out at the farm two or three different times, and I told him there were some in the warehouse and that they could get samples any time they wanted.

Q. Do you know that they took samples at various times from the warehouse?

A. I think so. They were told to do so.

Q. You mean when they were put in the warehouse?

A. Yes; they were delivered on the A. J. Ray contract. They was—it was so stated on the books in the warehouse.

Q. The warehouse books carry them as the A. J. Ray contract? A. Yes.

Q. Were A. J. Ray or other representatives of the defendant notified of the hops being delivered to the warehouse? A. Yes; Mr. Davis knew it.

Q. Was there any objection ever raised to the placing of any deliveries in the warehouse? [25]

A. No, there was not.

Q. After the time of the conversation on price selection did you have any conversation with Noakes

(Testimony of O. L. Wellman.)

or anybody else representing John I. Haas with respect to weighing in the crop?

A. Yes, I told Mr. Noakes—we generally always take a duck-hunting trip every year at the beginning of October, and I told him I would appreciate it very much if we could get our hops all taken in before we would go hunting.

Q. What did he say to that?

A. He told me he would certainly do his best to see that it was done.

Q. Had he, in prior years, accommodated you in that respect?

A. Yes. I think we went hunting on the first day of the season for the last ten or fifteen years.

Q. Did you have any conversation with respect to the exact time when they would weigh in the hops?

A. The exact date?

Q. Yes. When was the date selected for weighing in the hops? Tell us about that.

A. Steiner—that is, a representative of Steiner—and Mr. Noakes, they usually always took in hops at the same date.

Q. Who was the representative of Steiner you mentioned?

A. Ray Kerr and I think Johnny Smith. I think it was Johnny Smith or Troxel.

Q. Haas and Steiner took in at the same time?

A. Yes. There were three men, I think, from each group.

Q. What was the conversation with respect to

(Testimony of O. L. Wellman.)

picking the time when they would be weighed in?

A. I think we selected the date, the 24th—I went to Salem and stopped at Larmer's warehouse and talked to Mr. Kerr, Ray Kerr, and asked him how busy they were the next day.

He said, "I have got my work practically done and if you go up to the office to see Mr. Eismann, maybe these dates could be arranged."

Q. Mr. Eismann of Steiner's?

A. Yes; so I went up to the office and talked to Mr. Eismann and he said, well, as far as he knew that would be okeh with him, so I said, "You had better call Mr. Noakes and see."

Howard Eismann called Noakes on the telephone and asked him, he said, "How about taking in Wellman's crops tomorrow? Are you too busy"? "No," he said, "I think we can make it," and he said, "Well, I will make the necessary arrangements," and Eismann called Schwab's warehouse to arrange for the warehouse and called up the State inspection office to take their leaf-and-stem content.

Q. Had there been any leaf-and-stem analysis made up to that time? A. No, there wasn't.

Q. Had you had any conversation with a representative of John I. Haas with respect to the leaf-and-stem content of your hops? [27]

A. Yes, several times.

Q. Would you tell us what conversation you had, and where?

(Testimony of O. L. Wellman.)

A. I can't remember the dates, but I went up to Ray's office in Salem one day. I couldn't remember the date, but he had some samples up there, and I went up there to look at the samples, and I asked Mr. Noakes about quality and picking and so forth and he said, "Otto, you have raised hops long enough. We will just lay some of these out on the table and you be your own judge," and he took eight or nine or ten samples of different growers from different parts of the Valley, and he took three or four samples of mine and laid them alongside and he said, "You judge for yourself. You know enough about hops that I don't have to tell you how they average with the rest of them."

Q. How did they average with the rest of what he showed you?

A. He had a few samples—I said, "You have got some beauties here. I haven't seen very many like that," and then he had some of ours and some of the others that were badly infected by mildew, and some of them in betwixt and between, so I said, "Well, mine don't look so bad, do they"? "No," he said, "they don't."

I said, "Would you call it a good, fair average"? And Mr. Noakes said, "Yes. You are a long way from being at the end of the class."

Q. Did you have any conversation then about picking? [28]

A. Yes, he said, "You didn't do too good a job

(Testimony of O. L. Wellman.)

picking," and I said, "Cliff, I know that. I done the best I could."

Q. Did you have any conversation about the adjustment of the price with respect to leaf and stem?

A. No, not at that particular date, I don't think.

Q. Did you have any other conversation about adjusting the price for leaf-and-stem content?

A. Yes.

Q. Would you tell us about that?

A. I told Mr. Noakes the contract doesn't call for leaf-and-stem content in my contract, but I told him I was willing to take a cut for the leaf-and-stem content in these hops.

Q. What cut would that be? How much?

A. We didn't know, because we hadn't had a test at that time.

Q. That was, of course, before the weighing in?

A. Yes.

Mr. Kester: The leaf-and-stem analysis, I believe we can agree, was made on October 9th. That is the date shown on the certificate.

Mr. Kerr: Yes.

Mr. Kester: The report is dated on the 9th. When did the State inspection take the sample for the leaf-and-steam analysis?

A. The same day the hops were weighed in and received.

Q. The same day of the weighing in?

A. Yes. [29]

(Testimony of O. L. Wellman.)

Q. You said that was on the 25th of September that they were weighed in?

A. The 25th of September.

Q. Tell us what happened at that time?

A. Well, it was done in the same manner that it was the year before.

Q. How were the hops divided as between Haas and Steiner?

A. Schwab's warehouse done the dividing. They agreed with each one of the dealers that they were satisfied with the way they were separating the hops. They took care of lining them up. One had one platform and the other had the other.

Q. Odds and evens?

A. They would not take odds and evens. All the bales were not numbered; that is, the warehouse number—that is, from 1 on up. They took two bales at one time and two at another, on the other side. I think that is the way they done most of it.

Q. Had there been numbering prior to the time they were divided up, with the warehouse number?

A. Yes.

Q. After dividing the bales to one platform and the other, what did they do, as far as the representatives of John I. Haas were concerned?

A. Inspected and took tenth-bale samples.

Q. Did they take tryings out of each bale?

A. Yes, they did that every year. [30]

Q. Did they put numbers on the bales?

A. Yes, they numbered them from 1 on up.

(Testimony of O. L. Wellman.)

Q. And then, after the tenth-bales were taken, did they do anything else?

A. I don't think Ray always takes tenth-bale samples. He takes them at random but does not take even numbers of samples.

Q. Instead of taking 10, 20, 30——

A. No, he doesn't.

Q. How does he get the tenth-bale samples, then?

A. He generally takes a sample bale to match his split sample that he brings with him mostly.

Q. You mean he tries several and takes a sample out of one?

A. He takes a sample and matches it as to color and picking and so forth.

Q. He would get a sample corresponding to his type sample, then?

A. Yes, and he would sometimes take two samples out of one bale.

Q. Were the hops weighed in at that time?

A. Yes.

Q. Were you present at that time?

A. Yes.

Q. Were they handled in the usual manner?

A. Exactly like they had the three previous years.

Q. Had there been any prior arrangement between you and John I. Haas respecting whether that would be done in the same way as it always had been done? [31]

A. That was not questioned, I guess, so——

(Testimony of O. L. Wellman.)

Mr. Kerr: To save considerable cross-examination, will Counsel state the name of the person with whom the conversation was had, also the time and place?

Mr. Kester: Yes. I was just trying to find out, first, if there was a conversation.

Q. Did you have any conversation with anyone representing John I. Haas with respect to the weighing-in of the crop, other than what you have told us? A. No.

Q. Did you have any conversation with Mr. Noakes or anyone else with respect to the weighing-in of the hops would not be considered an acceptance? A. No, sir.

Q. After the hops were weighed in, did you have any conversation with anyone representing John I. Haas, Inc., with respect to whether or not they were accepting the crop?

A. That was not mentioned.

Q. Was anything at all said or did anything at all transpire between the time of the weighing-in on the 25th and the time you left on the hunting trip? A. No, there wasn't.

Q. After they were weighed in, did you pay any further attention to what they did with the hops?

A. No, I didn't. The warehouse put them in the warehouse— [32] put them back in the warehouse in a pile; stacked them back into the warehouse.

Q. When did you leave on your hunting trip?

(Testimony of O. L. Wellman.)

A. I think it was the 27th day of September.

Q. How long were you gone?

A. I think we got back around the 10th or 12th of October.

Q. When you came back, did you see Noakes or anyone else representing John I. Haas, Inc.?

A. Yes.

Q. What conversation did you have with him?

A. Well, Noakes told me that things has changed since the hunting trip, that samples had to go back East or to some other office before he could settle or pay for any of the hops.

Q. Did he tell you anything like that before they were weighed in? A. No, he didn't.

Q. What is the fact as to whether or not in the hop business weighing-in of the hops is or is not considered to be an acceptance of the hops?

A. Well, that is the only way I have ever sold hops; after they went across the scales, it was delivery.

Q. Is that the recognized practice in the hop business?

A. There may have been a few cases where a few growers signed agreements that it was not an acceptance.

Q. Did you ever have any such agreement in this case? [33] A. No, I didn't.

Q. After you got back from your hunting trip, Mr. Wellman, and Noakes said that they had to send

(Testimony of O. L. Wellman.)

samples East, then what happened? What happened after that?

A. Well, that went on for some time. I would go to the Salem office and then he said, "I will call the office at Hillsboro and see whether there is any return in," and the first time he did not have any and then the second time he said, "We got returns on the fuggles," and he tendered me the balance, a check for \$842 and something, with all the advances out on the fuggles.

Q. I show you what is marked Exhibit No. 1-E. They are all marked together, but one has got the letter "E," which appears to be a computation. Is that something which Mr. Noakes compiled at that time?

A. Yes, that is the statement Mr. Noakes gave me.

Q. Does that show the manner in which he arrived at the amount of the check, \$842.20?

A. Yes. All the advances are listed on this sheet.

Q. Did he give you a check for the balance or \$842.20? A. Yes.

Q. How was that arrived at? Did they deduct all the advances?

A. Took all the advances off on the fuggles.

Q. Advances for both the fuggles and clusters were taken from the fuggle payment? [34]

A. Both, yes.

Q. Did they raise any question about the quality of the fuggles? A. No, they didn't.

(Testimony of O. L. Wellman.)

Q. Did they raise any question about the leaf-and-stem content of the fuggles?

A. No, they didn't.

Q. Did they pay you the full market price for the fuggles, after deducting all these advances?

A. Yes.

Q. Did they ever pay you for the clusters at all?

A. No, they didn't.

Mr. Kester: Will Counsel stipulate with respect to the weights shown, without going into the figures at this time?

Mr. Kerr: We will so stipulate.

Q. (By Mr. Kester): After the conversation of October 28th when he delivered you that check, Mr. Wellman, what did he say about your clusters, if anything?

A. I said, "Cliff, what have you left off on the settling on the lates, or paying for the lates"? He said, "It don't make any difference." He said, "As quick as we hear from them, we will settle. In fact, I think it would help."

Q. Did he at that time say that any fault had been found with your clusters or lates or that they were being rejected?

A. There wasn't a word of rejection mentioned.

Q. Did they ever at any time, along about that period, say anything [35] at all about rejection of your clusters? A. No, it was never mentioned.

Q. What did he say with respect to whether or not—with respect to when they were going to pay for the clusters?

(Testimony of O. L. Wellman.)

A. Well, he said he didn't know. He said he would keep calling the office and as quick as they got returns in from the East he would call me.

Q. What further conversation did you have after that time?

A. Well, it went on a little later and I said, "Could a person see Mr. Ray sometime and talk to him, Harold Ray, on the way over fishing, and hurry this thing along"? And he said, "It might be a good idea." Ray was fishing on the Wilson River. It was after the rainy season started, so I had quite a visit with Mr. Ray. I was there probably an hour in his private office.

Q. Was there anyone else present at that time?

A. No, Mr. Ray and I were alone in his private office.

Q. Did Mr. Ray say anything about the payment for the clusters?

A. Well, we had quite a visit; talked over the difficulties of the season and the ups and downs, some of the experiences we had with picking and then he said, "Otto, I will do my best," so I went home.

Q. Do his best to do what? Did he say?

A. To get the money on these fuggles, these hops, find a place for them; he said something about finding a place for them. [36]

Q. Did he say anything at that time about John I. Haas, Inc., paying for them at all?

A. No, he didn't.

(Testimony of O. L. Wellman.)

Q. Did he say he had any instructions at that time to reject them or to refuse to pay for them?

A. No, he didn't.

Q. What other conversation did you have with Mr. Ray about that?

A. Mr. Haas came from the East and I talked to Mr. Noakes and said, "I certainly would like to sit down and talk to Mr. Haas," so he made an appointment to meet with Mr. Haas at A. J. Ray's office. The date I can't remember, but it was sometime in December. We made the appointment for 10:00 o'clock in the morning, and I went to Portland early and talked—picked up Mr. Kever in Portland and we went down to Ray's office and Mr. Ray said, "Well, Otto, I am very sorry, but Mr. Haas was called away last night," or sometime in the late evening, "and he is not here."

He invited us into his office. Mr. Kever and I we stayed there probably for—at least an hour and a half, an hour or an hour and a half talking farming and general conditions.

Q. During that conversation did Mr. Ray say anything about when or whether they were going to pay for the clusters?

A. That is the thing we went over to see him about, the reason we wanted to talk to Mr. Haas and I told Mr. Ray that I figured that Haas certainly has a moral and legal obligation to pay for these hops. Then Mr. Ray said, "Morally so, but I wouldn't just agree with you legally; but," he says, "certainly we owe you morally for them," and I

(Testimony of O. L. Wellman.)

said, "I have been tied up under this contract while the market was very good and spot hops sold very rapidly during the early part of September," and he just talked on—he said, "I will certainly see what I can do."

Q. Did he say at that time that John I. Haas, Inc., rejected your hops? A. No, he did not.

Q. Did you have any other conversation with him?

A. That is about the highlights of it as I remember it.

Q. Did you have any conversation with him after that?

A. Well, it was sometime in the latter part of April. I had an offer on the other half that were rejected from Williams & Hart. They had taken samples and Mr. Hart wanted me to come to Portland, so I came to Portland and I went up to see Mr. Hart and Mr. Hart told me, "I have got an offer on these hops, those rejected hops, those rejects, of 30 cents a pound for the half and if I could get the entire amount, including the Haas lot, I will pay 31 for the entire lot."

"Well," I said, "I can't sell the Haas lot because they are not released and I would have to see Mr. Shields before I could do anything," so I went up to Mr. Shields' office about 11:00 or 11:30 in the morning and Mr. Shields put a telephone call in to Ray's office to talk to Harold Ray, and Mr. Ray was [38] out so he told somebody in the office that

(Testimony of O. L. Wellman.)

when Mr. Ray comes in to call Roy Shields. So, while I was to lunch, Mr. Ray called and Mr. Shields asked him whether he would release these hops, that we had an offer, and that it was getting pretty late in the season and we were very anxious to dispose of these hops; that it would probably be the last chance I had to sell these hops that year, because when it gets towards the latter part of April or May, if you don't sell you are probably going to keep them. So, we went back to Mr. Haas' office—"Now," he says, "you and Mr. Kever go down to Hillsboro," that they were released, and Kever and I went down to Mr. Ray's office and he confirmed the release in the presence of myself and Mr. Kever at his office.

Q. Did he say you could go ahead and sell the hops? A. Yes.

Mr. Kester: Will Counsel stipulate that at that time the chattel mortgage, which is in evidence here, was still on file and had not been released of record; as a matter of fact, up to this time it has not been released of record? It has not been released of record up to this time, has it?

Mr. Kerr: No.

Q. (By Mr. Kester): You mentioned having an offer for the other half of the crop. Was that the half that Steiner had contracted? A. Yes.

Q. Will you tell us the circumstances about that half of the [39] crop? How did you happen to still have them? How is it they were still available?

A. They weighed them and received them the

(Testimony of O. L. Wellman.)

same way. Both lots were received exactly in the same manner, like they had in previous years.

Q. Did you have any agreement with Steiner about weighing-in should not be an acceptance?

A. No, I didn't.

Q. What did they subsequently do with their half?

A. I think I got a letter sometime in the latter part of October. I think you have a copy in the record there somewheres, where I got a letter from the Salem office that they were rejected.

Q. Did you subsequently arrive at a settlement with Steiner?

Mr. Kerr: I am going to object to that. There is no showing of materiality.

Mr. Kester: I think I can connect it up by one question.

Q. At any time, in conversation with Mr. Ray or anyone representing John I. Haas, Inc., was anything said about what John I. Haas, Inc., would pay if Steiner would settle?

A. They said they would certainly take them if Steiner would.

Q. What arrangement did Steiner subsequently make with you? What was the final outcome?

A. I turned it over to Mr. Shields and Mr. Shields filed an action and before it went to court their New York representative came out and went to Mr. Shields' office and we settled at that [40] time.

(Testimony of O. L. Wellman.)

Q. In that settlement did they pay you money? You do not have to state how much, but were you paid?

A. They paid cash; made a cash settlement.

Q. What happened to the hops?

A. And I kept the hops.

Q. Were they still in your possession at the time you had the offer from Williams & Hart?

A. Yes. That is the same lot I am talking about.

Q. Pursuant to the conversation with Mr. Ray that you have discussed here, was the entire lot of fuggles sold to Williams & Hart?

A. Not fuggles, late clusters.

Q. Late clusters?

A. Yes. Williams & Hart bought the entire lot of late clusters.

Q. At what price was that sale made?

A. At 31 cents; that is, without leaf-and-stem content; that is 31 cents for the lot.

Q. Regardless of the leaf-and-stem content?

A. Regardless of the leaf-and-stem content.

Mr. Kester: If the Court please, I may be corrected on this, but I believe the amount received on that resale was \$11,904.31 and, in the event of recovery here, that amount should be credited as the proceeds of the resale.

Q. Up until the conversation you had with Mr. Ray with respect [41] to releasing the crop for resale, had any representative of John I. Haas, Inc., ever told you that the crop had been rejected?

(Testimony of O. L. Wellman.)

A. No, sir; at no time.

Q. Did they ever pay for the clusters?

A. No, they did not.

Q. How would you compare your 1947 crop of late clusters with crops of hops which John I. Haas Inc., had taken in prior years?

A. They weren't as good as some that they had taken previously, no.

Q. How would they compare with all of them—that is, that John I. Haas had taken? Would you say—you say they were not as good as some.

A. Well, one year—I think it was 1945—we had an enormous crop and we had a severe attack of aphids and lost 200 bales of late clusters, got awful moldy and a lot of lates—they weren't only moldy to the core; they were black clear to the outside. I delivered every one of those hops that year.

Q. Did John I. Haas pay the full contract price for them then?

A. They paid full contract price.

Q. During the 1947 season did you have occasion to examine other crops of hops in the Valley?

A. Yes, I did.

Q. Did you have occasion to examine other samples and other hops in the bale? [42]

A. Yes, quite a few.

Q. How would you say that your crop compared with the general average of what you saw in the 1947 production?

(Testimony of O. L. Wellman.)

A. You mean the average for our district or the average for the Valley, or what?

Q. Well, take it for your district and then also for the Valley as a whole.

A. There were a lot of yards that were better, but there was a large amount that was a lot worse. Mildew hit at different stages in different yards, and I would say that I had at least a good average, if not better.

Q. Would you say your hops were or were not merchantable?

A. They certainly were merchantable.

Q. Do you know whether all other crops which were taken under contracts similar to yours had an equivalent amount of mildew in them?

A. Yes, several of them, and also an open-end sales, on open-end contracts and spot sales.

Q. On open-end contracts and spot sales?

A. Yes.

Mr. Kester: You may inquire.

Cross-Examination

By Mr. Kerr:

Q. Have you refreshed your memory as to whether or not you had a term contract with John I. Haas, Inc., prior to 1944? [43]

A. I have to look up the records. There are quite a few sales, and I had a memorandum, just a list of the sales of so much money from Harold Ray checks and——

(Testimony of O. L. Wellman.)

Mr. Kester: You know what the fact is. We will agree to it, whatever it may be.

Q. (By Mr. Kerr): This is the first time you have had any controversy of any kind over your hops? A. This is the first time, yes.

Q. In all your dealings since 1934 this is the first time? A. Yes.

Q. The first controversy that you have ever had?

A. That is right.

Q. Have you ever before had hops which were as dirty as 11 per cent pick? A. Yes, I did.

Q. When?

A. I couldn't tell offhand. I would have to look up the records. I think I have some hops at home. Leaf-and-stem content now is what you mean?

Q. Yes.

A. I think I had twelve once before on one lot.

Q. When was that?

A. 1943, I think, or somewhere in there.

Q. How many bales of hops were inspected at 12 per cent?

A. I couldn't say how many bales. [44]

Q. Was it a substantial quantity?

A. Yes, quite a majority.

Q. 12 per cent pick,—is that a well and cleanly picked hop?

A. No, it is not too clean a hop, no.

Q. In fact, it is a dirty hop, is it not?

A. It is considered so now. It was not in those years.

(Testimony of O. L. Wellman.)

Q. You mean during the war years people would take anything?

A. No; just getting cleaner hops, getting a lot of machines, machine picking. The machines pick them so much cleaner than you can by hand, so probably a 12 or 13 per cent hop would be a dirty picked hop.

Q. Since this present contract, executed in 1944, was signed by you, you have not had any hops picked as dirty as 11 per cent, have you?

A. Yes, I think I have.

Q. What year was that?

A. I said I would have to look up the records. I would have to look up the books to find out what years those were.

Q. Do you consider 11 per cent pick to be a well and cleanly picked hop?

A. I think it was a fairly well picked hop in 1947.

Q. Would you call it a well and cleanly picked hop, Mr. Wellman?

A. Well, we are paying for the extra leaf-and-stem content; we are being deducted for it.

Q. Irrespective of that, irrespective of price or anything else—— [45]

A. The dealer could probably tell you that better than I could.

Q. You are a hop grower and you know what the hop growers consider to be well and cleanly picked, surely. Surely you must have some opin-

(Testimony of O. L. Wellman.)

ion on it. Would you please state to the Court whether in your judgment an 11 per cent pick is a well and cleanly picked hop?

A. I would say it is a fairly well picked hop, but not a cleanly picked hop.

Q. It is not a well and cleanly picked hop, as that term is used in the industry?

A. I said a well picked hop but probably not cleanly picked, because there were a lot of hops picked which were dirtier than that.

Q. Not cleanly picked. What is the maximum or customary percentage referred to as the maximum percentage for cleanly picked hops in Oregon?

A. We used to figure——

Q. I mean in the year 1947.

A. The State set 8 per cent.

Q. So, anything over 8 per cent is not said to be cleanly picked, is that it?

A. I would say an 8 per cent hop picked by hand is a fairly cleanly picked hop.

Q. But anything over 8 per cent is not a cleanly picked hop?

A. I just answered your question, didn't I? [46]

Q. Answer it again, because I want to know what you mean. I want to make sure what you mean, if you don't mind. Is a percentage of leaf-and-stem content over 8 per cent a cleanly picked hop?

A. I said it was fairly clean-picked hop by hand-picking, yes. It is a cleanly picked hop.

(Testimony of O. L. Wellman.)

Q. Is an 11 per cent pick a cleanly picked hop?

A. Fair-picked hop, I said.

Q. But not cleanly picked?

A. Not clean, but fair.

Q. So that you acknowledge, do you not, that your 1947 late cluster hops containing 11 per cent leaf-and-stem content, according to the Federal-State inspection certificate, were not cleanly picked hops?

A. I do not.

Q. Why not?

A. Just as I stated before.

Q. I understood you to say 11 per cent is not a cleanly picked lot of hops.

A. I said it was a cleanly picked lot of hops by hand-picking.

Q. In any event, you now want the Court to understand that in your opinion as a hop grower in 1947 11 per cent leaf-and-stem content was a well and cleanly picked lot of hops?

A. I said fairly clean-picked lot of hops, hand-picking.

Q. Your contract with John I. Haas, Inc., specifies that the [47] hops shall be well and cleanly picked, does it not?

A. Yes.

Q. Did you consider the hops in 1947,—that is, the cluster hops,—to have been cleanly picked within that term?

A. In fact, I worked harder to get that crop of hops in 1947 than I ever did in those years.

(Testimony of O. L. Wellman.)

Q. Yes, but did you consider that the hops which you finally did get in 1947, after all of your work, with the 11 per cent leaf-and-stem content, were cleanly picked as that term is used in the contract?

A. For hand-picking in 1947 they were.

Q. Is an 11 per cent leaf-and-stem content hop in 1948 considered cleanly picked?

A. I wasn't in business in 1948.

Q. How about 1946?

A. Well, I think a lot of them sold for——

Q. Irrespective of what they sold for, were they cleanly picked? A. 11 per cent?

Q. Yes.

A. Yes, they were just as good as they were in 1947.

Q. Yes. I say, irrespective of the year—You keep saying 1947 that they were cleanly picked, but, irrespective of the year, in your judgment is an 11 per cent pick a cleanly picked hop?

A. Fairly clean-picked hop for hand-picking.

Q. But not cleanly picked, just fairly cleanly picked?

A. Fairly clean, yes, hand-picking.

Q. Did the mildew attack that your yard suffered in 1947 differ in any way from previous mildew attacks? A. Yes, somewhat.

Q. In what way, please?

A. It was later. I had several attacks late; had one in 1947, one in 1943, I think it was,—1942 or 1943, a late attack.

(Testimony of O. L. Wellman.)

Q. Were the cones of the hops affected in the same way during those years?

A. It hit later; two years, it hit later. That time it hit during picking. I lost about, I would say, 100 bales or so; turned red during picking, when we had a big crop.

Q. You did not pick those red hops, did you?

A. Didn't have enough pickers to get them picked; picked all we could and it got to raining and we left the rest of them.

Q. Was the type of damage to your 1947 cluster by reason of mildew the same type of damage that you suffered in previous years?

A. Yes, it made all the petals red and brownish-red.

Q. Which year? A. '37.

Q. How about '47?

A. Well, it hit them a little earlier in '37,—or in '47.

Q. As a result of hitting the hops a little earlier in 1947, did [49] it result in immature hops?

A. What do you mean, "immature"?

Q. Not fully developed?

A. Some, yes.

Q. To what extent? Was it a general condition in your yard or a slight condition?

A. Well, a general condition all over the Valley I think in '47, the yards that I had seen.

Q. That was the condition in your yard, is that right? A. Yes.

(Testimony of O. L. Wellman.)

Q. You said representatives of John I. Haas, Inc., were at your drier during picking. Specifically, who was that?

A. You mean during the harvest?

A. Well, I believe you said they were at your drier during picking.

A. Well, they were there several times at picking.

Q. Who were they?

A. Mr. Davis was there twice during picking, two or three times.

Q. Was Mr. Noakes there?

A. Mr. Noakes was there just prior to picking.

Q. I believe you said you tried to pick selectively, is that right?

A. I tried to, yes.

Q. But you gave it up, you said, as a bad job?

A. It couldn't be done.

Q. So then, you picked them anyway?

A. Yes, I picked those——

Q. You had downy mildew in your yard and you tried to pick selectively; that is to say, you tried to pick the good hops out of there and leave the bad ones?

A. Burr by burr.

Q. But you could not do it?

A. It could not be done.

Q. So, then, you picked them all, good and bad?

A. No, I didn't pick them all, because you can never pick them all.

Q. What did you pick?

(Testimony of O. L. Wellman.)

A. Some clusters—You have clusters where there are one or two bad hops on some certain arms, and I figured on just leaving those; couldn't make any money picking them as single hops; just couldn't get them out.

Q. Did you leave any part of your yard unharvested, completely unharvested?

A. You mean entire acreages?

Q. Yes. A. No, I didn't.

Q. Did you cut down any vines before the pickers? Did you say they should not touch those vines?

A. No, I didn't. [51]

Q. Just let your pickers go through the yard, picking as they saw fit?

A. I think we ran four sections. I think I had five employees in each section that had charge of the picking and harvesting. I had men hired. I didn't do it. I had men hired to do it.

Q. To do what?

A. Section bosses to run these sections, like they run them in your hopyards.

Q. Did they tell the pickers what to pick?

A. They certainly did. That is what they were hired for.

Q. Did they tell them not to pick mildew-damaged hops?

A. I gave my section men orders and they had to follow out the best they could.

Q. But they found they could not pick just the good hops?

(Testimony of O. L. Wellman.)

A. What do you mean, just the good ones?

Q. They could not pick just the hops that were not damaged by mildew and leave the others?

A. I said we could not pick them hop for hop.

Q. As a matter of fact, along about the middle of August you did not think you would harvest any clusters, did you?

A. I guess there were lots of other growers up to that time——

Q. Did you think you would harvest any of your clusters?

A. I couldn't tell because they were in bloom, and not enough growth to tell what you are going to harvest.

Q. What was your opinion as to whether or not you were going [52] to harvest the clusters?

A. I didn't have any at that time, like a lot of other growers.

Q. You did not have any opinion?

A. Not at that time.

Q. Later on did you think you would probably pick hops?

A. Some of the burrs were dried up and some of the bloom fell off. Some burrs in the yard made a second growth; some of the arms came out and produced hops.

Q. Did you tell anyone from Mr. Ray's office that you had given up any idea of picking selectively and were going to just pick all hops?

(Testimony of O. L. Wellman.)

A. Well, I think I reported that to Mr. Noakes, that it could not be done.

Q. Did you then tell him or anyone else that you were, therefore, going to go ahead and pick both mildew-damaged hops and good hops?

A. No, I don't think I ever made that statement.

Q. Who took early samples of your clusters, do you remember? A. I think Mr. Davis did.

Q. Was that at the warehouse or out at your drier?

A. Oh, there was a lot of them taken at the farm and a lot of them taken at the drier.

Q. Did you have any conversation or do you remember any conversation with Mr. Noakes or Mr. Davis about certain of your cluster hops which appeared to be of a little better quality than others?

A. Well, I had spots in some yards where the mildew didn't hit at all. There was one little yard that we had that was pretty clear from downy mildew.

Q. I am referring particularly to hops that had been harvested and had been picked but that were not yet baled?

A. That is this one yard I was speaking of.

Q. I didn't mean to interrupt.

A. What is the next question?

Q. Did you pick hops from this unaffected part of the yard? A. Yes; sure I did.

Q. Then what did you do with those particular

(Testimony of O. L. Wellman.)

hops? A. That one yard?

Q. Well, yes, the hops that were not affected by mildew,—Did you mix them in with the other hops?

A. Yes. I had this little yard, and when I got this entire crew of 300 pickers in there it was just impossible to put a baling crew in to bale them out, so I had to mix the others in the same bins—We had only four bins and we couldn't bale—We had to put them all in the four bins to complete our harvest.

Q. So you mixed them up with the rest of the hops, these good hops that came from a particular yard?

A. Yes, one little yard that was practically free from mildew.

Q. Then, you stated all hops which were delivered to the warehouse were carried on the books of the warehouse as A. J. Ray contract hops? [54]

A. That is the way they always go in if they were contract hops.

Q. They do that customarily?

A. That is a custom of the warehouse. That is the way I have always done.

Q. In other words, that listing in the warehouse records is made at the time the hops go into the warehouse, is that right?

A. That is right.

Q. What about the warehouse certificate for

(Testimony of O. L. Wellman.)

those cluster hops? Did you deliver that to Mr. Ray? A. No.

Q. As a matter of fact, you held that, didn't you, until you finally sold the hops?

A. I hold it until I have my money for the hops.

Q. That is, your money from Williams & Hart?

A. I turned the warehouse receipt over to Williams & Hart after they paid me for the hops, yes.

Q. You at no time offered that warehouse receipt to Mr. Ray?

A. There was no warehouse receipt. I think I had a load check.

Q. What is a load check?

A. That is by loads that are brought into the warehouse.

Q. Did you ever give this to Mr. Ray?

A. I have that at home, the load checks.

Q. You did not offer those load checks to Mr. Ray at any time?

A. I do when they pay for them, like I did for the fuggles. [55]

Q. Mr. Ray, I mean.

A. The load checks don't go to Mr. Ray. They go back to the warehouse and they get a warehouse receipt for them.

Q. Then how did you handle the matter of the warehouse receipt after you sold the hops finally to Williams & Hart? Did you then take the load checks down to the warehouse and get a warehouse certificate?

(Testimony of O. L. Wellman.)

A. I turned the load checks in and had the warehouse receipt made to Williams & Hart.

Q. Yes. When did this demonstration you referred to of samples by Mr. Noakes to you take place? I believe you said on some occasion a number of samples of hops of growers were shown to you by Mr. Noakes.

A. That was in Mr. Noakes' office, the sample room.

Q. When was it?

A. That was in his sample room.

Q. When was that, do you remember?

A. I wouldn't know the exact date.

Q. Was it in September or October?

A. Must have been September.

Q. You are sure it was in September?

A. Yes.

Q. That was before you went fishing, is that right?

A. Before they even received the hops; immediately after picking—after baling and harvesting.

Q. Did Mr. Noakes tell you at that time that the samples had been sent there for inspection?

A. No, he didn't at that time.

Q. Did he tell you such samples had been sent to New York before that? A. No, he didn't.

Q. To Washington, D. C., rather?

A. No, he didn't.

Q. When was the first time, if you recall, that

(Testimony of O. L. Wellman.)

he told you samples of your hops had been sent to John I. Haas, Inc., Washington, D. C.?

A. Shortly after I returned from hunting.

Q. That would be about when?

A. Oh, about the second week in October, the 14th or 15th, some date in there, 1947.

Q. Do you recall when you started on your hunting trip?

A. Yes, the hunting season opened the 4th and we were up there, I think, the day before. That is the reason I remember that date.

Q. Shortly after your tenth-bale samples were taken of your cluster hops you went hunting, is that right?

A. What do you mean, tenth-bale samples? You mean the whole operation?

Q. Well, I believe you testified tenth-bale samples were taken of your cluster hops? [57]

A. The whole of the work was done that same day, on September 25th.

Q. Then you left for a hunting trip?

A. A day or two afterwards.

Q. A day or two after when?

A. After the 25th.

Q. After the 25th of September?

A. September, yes. We were up there the 4th of October.

Q. Then you returned about the middle of October, is that right?

(Testimony of O. L. Wellman.)

A. I think around the 13th or 14th, somewhere in there.

Q. So it must have been, then, a day or two after your samples were taken that this demonstration of samples to you by Mr. Noakes took place?

A. No, they had samples before that. Before they ever received them, they always take samples, before they do any receiving.

Q. Do you think that this occasion was before the tenth-bale samples had been taken?

A. Why, certainly, it was before tenth-bale samples, before that.

Q. Was it at that time you told Mr. Noakes you would be willing to take a cut in price because of the leaf-and-stem content?

A. That was just prior to the taking in of the hops that I told him I would agree to a cut for leaf and stem, yes.

Q. Was that on the basis of the type samples? Why did you offer to take a cut in price on the 11 per cent pick? [58]

A. Well, he said they should have been a little better picked that year. That is why I agreed to that, because the market was around 85 cents at that time, or I think it was at that time.

Q. Was anyone else present other than yourself and Mr. Noakes at that time?

A. Well, I was in his office quite a few times. I visited him alone I think the day we looked at the

(Testimony of O. L. Wellman.)

samples. I think Mr. Noakes and I were alone in his office.

Q. You said no one told you the hops were rejected. Did anyone ever tell you the hops would not be accepted by John I. Haas, Inc.?

A. No.

Q. Nobody ever told you?

A. No, they did not.

Q. Nobody ever told you the hops were not accepted by John I. Haas, Inc.? A. No.

Q. Did anyone ever tell you the hops were not satisfactory to John I. Haas, Inc.? A. No.

Q. Did anyone ever tell you John I. Haas, Inc., found the hops of poor quality?

A. He may have told them, but he didn't tell me.

Q. Then, as you recall it now, you had no conversation with anyone prior to May or April of 1948 about your hops being of [59] poor quality?

A. Well, Mr. Ray said on account of the mildew it was probably a little harder to move these hops that year.

Q. When did he say that?

A. I don't know. That was—I think it was around just before the holidays, sometime when I was over there.

Q. It was sometime before Christmas?

A. I don't remember the date.

Q. Was that the first time anything was said about the hops not being of good quality?

(Testimony of O. L. Wellman.)

A. No, that was never mentioned to me.

Q. On these occasions, when you talked to Mr. Ray at his office, was anyone else there other than you and Mr. Kever and Mr. Ray?

A. Mr. Kever and Mr. Ray and myself.

Q. Was any marking put upon the bales of your clusters when they were weighed?

A. What do you mean, marking,—numbers?

Q. Any kind of a mark at all.

A. They were numbered from 1 on up.

Q. Was that the only marking put on them?

A. That is the only mark that Ray or Mr. Noakes put on——

Q. Did you see anyone else put any mark on them?

A. There was the warehouse number on them.

Q. The warehouse numbers and the bale numbers were the only marks put on these bales at the time they were weighed? [60]

A. Mr. Noakes and his helpers marked them from 1 on up, and I think a “G” number, or code number—I think “99” and an initial or number, “K” or “B,” warehouse identification mark.

Q. But the name “John I. Haas, Inc.,” or the initials “J. I. H.” were not put on any of the bales?

A. They are very seldom ever put on at that time.

Q. They were not put on these bales?

A. They are not put on at that time, no.

(Testimony of O. L. Wellman.)

Q. Or any other time while they were in your possession or at least in the warehouse?

A. I don't know whether they put it on some of them or not. They generally mark them when they ship. I wasn't there when they shipped those to see whether they put it on those or not.

Q. On the clusters—You never saw that on the clusters? A. Not "J. I. H.," no.

Q. You stated Mr. Noakes on one occasion told you he would call you as soon as he had returns in from the East. Do you know what he referred to as "returns from the East"?

A. No, I don't.

Q. Did you ask him?

A. No, I didn't.

Q. What was your understanding, then, of what he was talking about, when he said he would let you know?

A. I supposed he was waiting for their order to pay for them from the Eastern office. [61]

Q. Do you recall when that conversation took place?

A. No, I don't remember those dates; just too far back.

Q. You did not state the date of your visit with Mr. Ray when he said he would do his best to find a place for the clusters.

A. That was shortly before Christmas, before the holidays.

(Testimony of O. L. Wellman.)

Q. What was your understanding of what he meant by finding a place for the clusters?

A. Well, I am not too familiar with his business. I don't know just how he was hooked up with Mr. Haas, whether they had them recontracted with a brewery or whether they went direct to Haas. I don't know.

Q. When you say he referred to a moral obligation, what was your understanding of what he was talking about?

A. A moral obligation to take these hops and pay for them.

Q. At what price?

A. At the stipulated price.

Q. The full contract price?

A. Less leaf-and-stem content.

Q. Was it your view they were obligated to take them at a price, at the stipulated price, with some deduction for leaf-and-stem content?

A. Whether he was obligated?

Q. Yes, whether or not they were obligated to take them?

A. Yes, they were delivered.

Q. Delivered where? [62]

A. To Mr. Ray or—Noakes accepted them, weighed them and marked them.

Q. Marked them with the bale numbers.

A. Yes, just like they did in 1946.

Q. You considered that to be an acceptance of the hops?

A. Certainly.

Q. And prior to that marking or that weighing,

(Testimony of O. L. Wellman.)

which you considered an acceptance, had you reached any agreement concerning the price that was to be paid for them? What was to be the price on the basis of the leaf-and-stem content?

A. 85 cents less a cent for each pound over 8 per cent pick, and a premium for under.

Q. Was that just your idea, or did you have an agreement on that with somebody?

A. We just talked about it.

Q. Who are "we"?

A. Mr. Noakes and I.

Q. What did Mr. Noakes say about it?

A. What do you mean, say about it?

Q. Did he tell you that John I. Haas, Inc., would pay that?

A. I don't think John I. Haas, Inc., was mentioned at all.

Q. Did he say that anyone else would pay that?

A. Why, certainly, we agreed to the 85 cents, so why shouldn't it——

Q. I mean 85 cents just for the leaf-and-stem content? [63]

A. Yes, that is the agreement. I said it was.

Q. You say Mr. Noakes agreed that someone would pay you the contract price less 1 cent for each 1 per cent above 8 per cent pick, is that right?

A. Yes.

Q. That is your understanding of the agreement?

A. Yes.

Q. That was an oral agreement, was it?

(Testimony of O. L. Wellman.)

A. Yes.

Q. There was nothing put in writing on that?

A. No, there wasn't.

Q. When you told Mr. Ray in April that you had an offer on your rejects, did you have any difficulty getting a release on these hops from Mr. Ray?

A. No; when Mr. Shields called him, he said he would release them.

Q. What did he say to you when you went down to his office and talked to him?

A. Well, he confirmed that statement that he made over the telephone to Mr. Shields.

Q. What did he say to you, if you remember?

A. I wouldn't remember everything that he said because I visited with him for practically an hour.

Q. When is it that you say Mr. Ray told you that John I. Haas, Inc., would certainly take these hops if Steiner did? [64]

A. I think that was the first time I visited him.

Q. That was about when?

A. The beginning of the rainy season in the fall of 1947.

Q. Was any mention of price made at that time?

A. No, there wasn't.

Q. Half of your 1947 cluster crop under contract with Steiner was rejected by Steiner because it was mildew-damaged, was it not?

A. That is what they said.

Q. That was the ground on which they rejected it, isn't that right?

(Testimony of O. L. Wellman.)

A. I think the letter reads—it says that “These hops do not come up to contract specifications, so, therefore, we reject them.” I think that is the statement in the letter.

Q. Those hops were the same quality, grade and condition as the other half?

A. They were half of that lot, yes.

Q. Mr. Steiner never did take in these hops, did he? A. They made a settlement.

Q. That settlement did not involve the taking over of the hops or the acceptance of hops by Steiner?

A. We took a cash settlement and turned them over to Williams & Hart.

Q. You kept the hops? A. Yes. [65]

Q. So, the Steiner Corporation did not even want the hops? Is that right?

A. They rejected them.

Q. Your sale to Williams & Hart was at 31 cents, on a basis of sample, wasn't it, a spot sale?

A. Yes, when they sent the samples in, they wrote across the top “Rejects,”—“S. S. Steiner Rejects, John I. Haas, Inc.,” or “J. I. Haas,”—I forget which—wrote “Rejected Samples” when they sent them to Williams & Hart office.

Q. They took them regardless of the leaf-and-stem content?

A. I don't know how they may have taken them, but they paid me 31 cents a pound.

(Testimony of O. L. Wellman.)

Q. They also took them irrespective of quality, didn't they?

A. They inspected them, went through them just like any other dealer.

Q. But you did not sell them to them as prime quality hops?

A. I sold them on sample.

Q. Was the sampling of these cluster hops by A. J. Ray & Son's men done in the manner that is customary in the industry? A. Yes.

Q. And, in your opinion, was it properly done?

A. Yes, I think so.

Q. You stated your 1947 crop of cluster hops was merchantable. What did you mean by that, Mr. Wellman?

A. I don't think I said "Merchantable," did I?

Q. Well, what is your statement now? I think you said "merchantable." If you did not, what is it now?

A. They were good, salable quality.

Q. A good salable quality at what price?

A. We stated the price—we agreed on the price.

Q. You mean to say in your opinion you could have sold them at 85 cents a pound?

A. Yes, I could have sold them off at 85.

Q. These cluster hops with 11 per cent pick you could have sold at 85? A. Yes, 85.

Q. Did you have any firm offer for them?

A. Several neighbors sold them without contracts, at least five or six spot sales.

(Testimony of O. L. Wellman.)

Q. 11 per cent pick?

A. Some were 11; some were 9; some figured at a premium—was getting a premium for under 8.

Q. Were they blighted hops?

A. Certainly they were.

A. As badly blighted as yours?

A. Some of them just as bad; some of them worse.

Q. Were your 1947 cluster hops well and cleanly picked? A. Fairly clean pick.

Q. Would you say that the picking was not too good?

A. I just answered that question two or three different times. [67]

Q. Would you say that the picking was not good?

A. Fairly good.

Q. I call your attention to a statement in your deposition on Page 34:

“Q. Were they well and cleanly picked?

“A. No, the picking wasn’t too good.”

Do you agreed with that now?

A. Well, fairly. Listen. Like I said before, “fairly” is a fairly good picked hop at hand-picking.

Q. Then, you are changing your position now, is that right? You want to substitute “fairly well picked”? A. Fairly well picked.

Q. For “No, the picking wasn’t too good,” is that right? In other words, would you now say your picking wasn’t too good?

(Testimony of O. L. Wellman.)

A. I think it was a fairly good job of picking in the year 1947.

Q. Were your hops well harvested and baled in 1947? A. Yes.

Q. Your clusters, were they of even color?

A. What do you mean, the entire yard?

Q. Yes. Hops in bales, I mean.

A. I have never seen an entire hopyard that was of even color all the way through, in my life.

Q. Were these of even color?

A. Not that year, of even color.

Q. Were the samples taken from each bale, from the tenth-bales, were they of even color? [68]

A. I don't know whether they took tenth-bale samples.

Q. Did you see any samples that were taken?

A. Very few on the day they received them.

Q. Did you see any of them at all, any time?

A. Yes, I seen a few.

Q. When you saw them, were they of even color?

A. No, they were not.

Q. Why not?

A. Because I never seen a hop grow that way.

Q. In what way was the color not even?

A. You have a greenish hop; you have a yellow hop, and you have some with wind whip; you have some with mildew on them, tinted on the outside and——

Q. Were they free from damage by disease?

A. No, they were not.

(Testimony of O. L. Wellman.)

Q. What disease damage, then?

A. I said there was mildew in them.

Q. Did the samples indicate some immature hops?
A. They always do.

Q. Did these?
A. Yes.

Q. Wasn't that immaturity due to mildew damage?

A. Hops will never mature evenly, that is, all mature at the same time. I have never seen that. You always find some green hops or some immature hops. [69]

Q. In the samples of the 1947 clusters was there any evidence of immaturity because of mildew damage?
A. Yes, there was some in there.

Q. What was your estimate, at the beginning of the harvest, of the quantity of hops you would harvest, cluster hops, in 1947? Did you make any estimate?
A. I don't think so.

Q. Did the harvest turn out as heavily as you had expected?

A. No, I didn't get as many as I thought I would get.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. One or two questions, Mr. Wellman: Was the mildew on your hops of such a character that it affected the lupulin on the inside of the cones?

A. No.

Q. Counsel asked you about the Steiner settle-

(Testimony of O. L. Wellman.)

ment, whether Steiner ended up eventually taking your hops. Was there some discussion in connection with that settlement as to whether Steiner would take the hops at a certain price or whether he would pay you and let you keep the hops? In other words, were there many different arrangements discussed?

A. There were many angles of that kind, so many I can't remember them all. Mr. Shields handled the main part of it for me at that time.

Mr. Kester: I think that is all.

(Witness excused.) [70]

RAY J. GLATT

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Ray J. Glatt?

A. Yes, sir.

Q. Where do you live, Mr. Glatt?

A. Woodburn, Oregon.

Q. Do you have a hop ranch yourself?

A. Yes, sir.

Q. How long have you been in the hop business?

A. About twenty years.

Q. Approximately how many acres of hops do you have? A. About 90 acres.

(Testimony of Ray J. Glatt.)

Q. What is your ordinary production of hops?

A. Oh, between 550 and 675 bales.

Q. Did you have a contract in 1947 with John I. Haas, Inc.?

A. Yes, sir.

Q. Through whom was that contract negotiated? Who handled the arrangements for that?

A. Mr. Clifford Noakes.

Q. He is the Salem representative of A. J. Ray & Son?

A. Yes.

Q. Was it your understanding he negotiated on behalf of John I. [71] Haas, Inc.?

A. It was.

Q. Have all your dealings with John I. Haas, Inc., been through A. J. Ray & Son or Clifford Noakes?

A. They have.

Q. Will you state what different contracts you had with John I. Haas, Inc., in 1947.

A. There were two contracts with a minimum price and guarantee of the market, and the third contract on a firm price of 45 cents.

Q. Did they cover both fuggles and clusters, or what?

A. They covered the entire crop, fuggles and clusters.

Q. What portion of the crop was on the fixed-price contract?

A. 20 acres of late clusters.

Q. 20 acres of late clusters?

A. Yes.

Q. And what was the fixed price on that contract?

A. 45 cents.

Q. What portion was covered by the other two, or either of the other two open-end contracts?

(Testimony of Ray J. Glatt.)

A. There was a balance of the acreage, or approximately 70 acres.

Q. How were they divided as between those two contracts?

A. One contract covered 20 acres of fuggles and 20 acres of late hops, and the other contract was on about 30 acres of late hops. [72]

Q. Did you, under that open-end contract, select the growers' market price? A. I did.

Q. What growers' market price did you select?

A. 85 cents on the late hops. The market at that time was 90 cents a pound on the fuggle hops.

Q. Did any of these contracts contain a clause varying the price for the leaf-and-stem content?

A. They did not.

Q. They did not? A. No.

Q. What has been the custom? Has it been customary in your dealings with John I. Haas, Inc., to make a price variation on leaf-and-stem content?

A. Not up to the time that this contract was signed, which was several years prior to 1947.

Q. This was a long-term contract?

A. Yes.

Q. It did not have the leaf-and-stem clause in it?

A. No, it did not.

Q. Did you have experience with downy mildew in your yard in 1947? A. I did.

Q. Was it rather general throughout the yard?

A. It was with the exception of part of the yard. It was [73] general, yes. However, it was worse in

(Testimony of Ray J. Glatt.)

parts of the yard than in other parts; that is, the late hops.

Q. Did it affect the fuggles at all?

A. Not that I could see.

Q. Did you have occasion to observe other hop-yards in the Valley, to see how other crops in the Valley were doing, compared to the amount of mildew you had, or to see what the situation was in the Valley at that time?

A. Not too extensively; just local.

Q. Around your own vicinity there how would you compare your mildew with what the others had?

A. Oh, mine was about average; part of it worse and part of it better.

Q. Do you remember what leaf-and-stem content you had in your various crops?

A. As I recall, the fuggle crop, the leaf-and-stem content in the fuggle crop was 7 per cent.

In the late clusters it was 9 per cent, and on the firm—that is, on the firm-price contract of 45 cents—it was 10 per cent, as I recall the figures. I would have to check them.

Q. Did you deliver hops under those contracts to John I. Haas, Inc.? A. I did.

Mr. Kerr: I see no relevancy, your Honor, in this testimony. [74] It relates to an entirely different contract.

The Court: What is the point?

Mr. Kester: The point is, your Honor, it shows the practice of the trade and, in particular, the

(Testimony of Ray J. Glatt.)

practice of this particular buyer with respect to how it construed its own language in the contract.

The Court: On what point?

Mr. Kester: With respect to what kind of hops they took in on this contract and with respect to how they treated this leaf-and-stem content, when there is no clause in the contract covering it.

The Court: You people have discussed the case. Don't you know what the issues are?

Mr. Kester: There was no pre-trial, your Honor, and we have not had a chance to find out about their defense.

Mr. Kerr: Well, your Honor, we deny that an 11 per cent pick is a well and cleanly picked hop.

The Court: Go ahead.

Q. (By Mr. Kester): Did they take all your crop? A. Yes, sir.

Q. Did they take hops that were affected by downy mildew?

A. Yes, with the exception of 108 bales that were relatively free from mildew; not entirely, but relatively free from mildew. I made an effort to harvest these hops to the best of my ability.

Q. Was it physically possible to harvest the crop so as to [75] eliminate all the mildewed hops?

A. Not 100 per cent.

Q. You did the best you could? A. Yes.

Q. Did those 108 bales differ from the rest of the crop? A. They did.

Q. What settlement did you make with John

(Testimony of Ray J. Glatt.)

I. Haas, Inc., or what price arrangement did you make with John I. Haas, Inc., on your 108-bale lot?

A. They deducted one cent a pound for one per cent leaf-and-stem content over 8 per cent. In other words, these hops were 9 per cent and I received 84 cents a pound for these hops.

Q. What arrangement did you make to close out the other parts of your crop on the 45-cent fixed-price contract? Did they take all those?

A. Yes.

Q. Did they raise any question at all about the quality?

A. I believe that they deducted—I can't answer now definitely. The hops were accepted.

Q. The hops were accepted? A. Yes.

Q. On the 45-cent contract? A. Yes.

Q. On the other open-end contract, the open-end contract for the fuggles, did they take all those at the regular price? [76]

A. At the regular price, 90 cents a pound.

Q. How about the open-end contract on the clusters? Did they take those?

A. Yes, they did.

Q. What arrangement did you make with them on the price of those?

A. As I recall, I received 74 cents a pound for those.

Q. That was on an 85-cent selection?

A. Yes.

Q. Do you remember what the pick was on them?

(Testimony of Ray J. Glatt.)

A. As I recall, it was 9 per cent.

Q. Did you have any arrangement with John I. Haas, Inc., prior to weighing in of your crop with respect to their procedure in weighing in? Did they inform you with respect to what they would or would not do on weighing in your crop?

A. I was notified by letter from A. J. Ray Hop Company, signed by H. W. Ray, that when my hops were inspected and weighed in that did not constitute an acceptance of the crop.

Q. Ordinarily in the hop trade if there is no such agreement, would the weighing-in constitute acceptance? Is that the general practice?

A. It would, providing there was an agreement on the part of the seller and the buyer that those hops would be accepted at a certain price, and provided the general line of samples cut or tryings would meet the type sample; yes. [77]

Q. About when were your hops weighed in, do you remember?

A. I can't give you the exact date, but I believe it was along about between the 15th or 20th of August, as I recall. Pardon me; I mean September.

Q. September? A. Yes.

Q. Was it the general practice in the hop trade that, at the time they are weighed in, there are only two things that are to be determined, that there must have been a price selection and that the samples must run true to the type samples previously taken?

(Testimony of Ray J. Glatt.)

Mr. Kerr: I object to the question. It has nothing to do with price selection.

Mr. Kester: I thought he said there would be an agreement on price.

Mr. Kerr: That is different from price selection.

Mr. Kester: Would you explain that again to make sure?

The Court: Why ask it a second time? He has answered it once.

Mr. Kester: I wanted it cleared up.

The Court: Why clear it up, if he has answered it once?

Mr. Kester: I think that is all.

The Court: You mean you want him to emphasize it. You don't want to clear it up. You want him to emphasize it. Ask some other question.

Q. (By Mr. Kester): Were you subpoenaed to come here? A. Yes.

Mr. Kester: Thank you very much.

Cross-Examination

By Mr. Kerr:

Q. Would you say that your 1947 hops, your 1947 crop of hops, were badly affected by downy mildew? A. On the vines, yes.

Q. Particularly on the vines? A. Yes.

Q. How about in the bales?

A. The 108-bale lot showed traces of mildew on the petals, but, generally, I thought it was a very fair quality hop for that year.

Q. Was it because of the downy mildew in the

(Testimony of Ray J. Glatt.)

108 bales that John I. Haas, Inc., objected to those particular hops?

A. There was no objection to those particular hops.

Q. There was quite a concession on them?

A. Of one cent a pound, yes.

Q. You said you did the best you could to avoid picking mildewed hops, is that right?

A. That is correct.

Q. Is it possible to pick selectively?

A. I think it is not practical, to my way of thinking. [79]

Q. That is to say, it is too costly, is it not?

A. Yes.

Q. So the grower has a choice under those circumstances of either not picking at all or of picking and taking a chance on rejection, is that right?

A. I assume that is correct.

Q. He takes that risk if he does pick?

A. That is true if his hops do not meet the quality demanded.

Q. In 1947, about September, the market price for hops, prime quality hops, was pretty high, wasn't it? A. Yes.

Q. Wasn't there quite a temptation on the part of the grower to pick whatever he could pick? Wasn't there quite a temptation on the part of the grower to pick whatever he could pick and then take his chances on what he could get for them?

A. I can't speak for other growers.

(Testimony of Ray J. Glatt.)

Q. Was that your attitude?

A. My attitude was to pick as good a hop as I could pick.

Q. Did you leave any part of your yard unharvested at all? A. Yes.

Q. In that case, then, you felt that the best hop you could pick in that part of the yard was not good enough to market? A. Correct.

Q. So you did not pick any of them?

A. Correct. [80]

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. On these 108 bales, was there any price concession that wasn't for leaf-and-stem content?

The Court: He said No.

A. No.

Mr. Kester: I think that is all.

(Witness excused.) [81]

JOSEPH J. KEVER

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is Joseph J. Kever?

A. Yes.

Q. Where do you live, Mr. Kever?

(Testimony of Joseph J. Kever.)

A. Portland, right now.

Q. Are you engaged in active business now?

A. Well, I am retired, but I try to sell real estate to keep me out of mischief.

Q. What has been your occupation over the years?

A. Banking business in Mt. Angel for about since 1907, pretty near forty years.

Q. Forty years in banking? A. Yes, sir.

Q. Your bank was at Mt. Angel?

A. At Mt. Angel.

Q. What was your position in the bank?

A. Cashier.

Q. In that position did you have anything to do with making loans on farms and things of that sort?

A. Oh, yes.

Q. Did you make it part of your business to be familiar with [2] the hop trade generally?

A. Yes.

Q. Over how long a period of time have you been familiar with the hop business?

A. At least thirty-five years.

Q. In the course of that time did your bank make loans on your judgment of hop conditions and quality and so forth? A. Yes.

Q. Did you follow the trend of the market in hops, generally? A. Oh, yes.

Q. Are you familiar with the particular hop-yard of Otto Wellman?

(Testimony of Joseph J. Kever.)

A. Yes, I have had an interest in it for a number of years.

Q. Did you have any interest in it in 1947?

A. No.

Q. Did you have occasion to be out in the hop-yard in 1947? A. Oh, yes.

Q. Did you observe the cultivation practices and the way the crop was taken care of that year?

A. Yes. I was in the habit of going out in the country and I like hops and I visited quite often during the summer.

Q. What would you say with respect to the manner in which he was taking care of the yard that summer?

A. One of the outstanding yards in the country. I think everybody in that neighborhood knows it.

Q. Were you there during picking?

A. Yes.

Q. Did you observe the manner in which the hops were being picked?

A. I went down in the yard and picked with the pickers.

Q. You picked, yourself?

A. Just to make them—just to make a good feeling. I didn't pick only for a half-hour or so, but I did that several times.

Q. What did you observe with respect to the manner in which the hops were being picked?

A. I talked to people around close to me and they were all trying to do a good job. I noticed,

(Testimony of Joseph J. Kever.)

too, that all the bosses were in there watching them, watching the picking. Some hops were covered with mildew.

Q. You did observe the presence of mildew there, did you? A. Oh, yes.

Q. What would the pickers do with respect to mildewed hops that you saw?

A. They were trying not to pick too many mildewed hops, if they could help it, but it couldn't be done.

Q. Is it possible in the hop business to pick hops so as not to pick any with mildew, if there is mildew in the yard?

A. I don't see how you can. I don't see how you can do it.

Q. How are these hops picked? How do they get them off the vines? [84]

A. They have arms and you just strip them and get them in a basket.

Q. Do they strip off a quantity of hops in one stroke? A. Oh, yes.

Q. Is it possible or feasible or practical to pick hops one at a time?

A. Well, unless you want to do it that way and it don't cost you anything, you might do it.

Q. From your knowledge of the hop business and the banking business, would it add to the farmer's cost of production if he attempted to pick the hops one at a time?

(Testimony of Joseph J. Kever.)

A. It couldn't be done and make a profit, that is sure.

Q. Did you see Mr. Wellman's hops after they were baled and sampled?

A. I saw them—I saw some samples from the bales around the place.

Q. Did you see samples of his baled crop?

A. Oh, yes.

Q. Did you have occasion to see the hop crops of others, from parts of the Valley, or of other ranchers?

A. During the hop-picking season, right about that time, I took two trips, with Mr. McNeff, hop buyer and dealer. We drove all over the country and also down towards Salem and Independence in the hop district where most of the hops are raised.

Q. Did you have occasion to see samples of the hop crops after [85] they had been harvested?

A. Yes.

Q. How would you say Mr. Wellman's 1947 crop compared with the general average of other crops harvested in the Valley that season?

A. We talked about that in driving around. There were very few that did not have some mildew. I don't know as we run across——

Q. How would you say they would be with respect to the average crop for the season?

A. I think it was average.

Q. From your knowledge of the hop business, would you say the mildew you saw in Mr. Wellman's

(Testimony of Joseph J. Kever.)

hopyard was of such nature it would get in the lupulin content of the hop?

A. It didn't get into that.

Q. From your acquaintance with the hop business and the way hops are bought and sold, what is the fact as to whether or not generally in the hop trade the weighing-in of hops is considered to be an acceptance of the hops?

A. I have always understood it that way. I had an experience myself. My brother and I had a yard some years back. Somebody bought the hops on sample, and we waited a few days to take them in, and in walking down from the bank to the warehouse—the market had dropped and I said, “I will tell you, don't weigh them in; don't stick them. We don't want them hops. If [86] they are stuck it is going to be hard to sell them; just as well turn them down now. Other buyers would know there was something the matter with those hops probably.”

Q. What is the fact as to whether hops would be readily salable after one dealer has sampled them and weighed them in and then, for any reason, has refused to pay for them?

A. Sampling don't hurt them; but if he thinks they are tied up, one dealer don't want to bother with the crop. I didn't do it. It is not good business, until things are settled. Probably you might lose out, that you can't sell them to somebody else.

Q. What would you say with respect to whether

(Testimony of Joseph J. Kever.)

or not Mr. Wellman's 1947 clusters were good, merchantable hops that season?

A. Well, I think they was average, yes.

Q. Were you present with Mr. Wellman, or Mr. Noakes, when he conversed with Mr. Ray or anyone representing John I. Haas, Inc.?

A. Yes, it seems to me we went over there about three times, the way I remember, from Portland.

Q. State what those occasions were and what happened on each one of those occasions.

A. Well, Wellman and I had talked this over, and that is all we done. We had known Ray a long time and we didn't want—I didn't want to have to go to a lawsuit to force them to take these hops. I thought maybe we could talk it over—we had dealt with him a long time—and see what he could do for us. [87]

Q. What conversation occurred between you and Mr. Ray and Mr. Wellman?

A. We talked about it, talked to Ray. He said he realized that Wellman had been in business for a long time and he said he thought something could be done; that is the main thing.

Q. Did he say anything about the hops being rejected or not paying for them?

A. No, I don't think he did, that time.

Q. Did he at any other time?

A. He might have before then—before they started suit, I mean; he might have said something about that, it seems to me, but the impression I got

(Testimony of Joseph J. Kever.)

was that he was not going to take them.

Q. When was it you got that impression?

A. It must have been about March or April.

Q. About March or April?

A. Yes, I am sure it was.

Q. Were you present at the time Wellman and Ray talked about releasing that crop so he could sell it to Williams?

A. Yes, I went over, after the attorney had called up and he said, "You had better go over and have it okehed by Mr. Ray. I talked to him over the phone," he said, "but you had better have him okeh it." That was all that was said about it.

Q. With your experience in and knowledge of the hop business, what have you observed with respect to when buyers reject hop crops with respect to market conditions? [88]

A. If the market—there are times when you can't sell a bale of hops at all to anybody. I would rather see a man sell them right out. He never knew where he was at when there was a slump in the market.

Q. During the time when the market is up, do buyers customarily say anything about quality?

A. They take most anything, because I have gone through that experience myself. When the market is up, there is no trouble.

The Court: Adjourn until tomorrow morning.

(Thereupon, at 5:30 P.M., an adjournment was taken until 9:00 o'clock A.M., Saturday, January 29, 1949.) [89]

Court convened at 9:00 o'clock A.M. Saturday, January 29, 1949.

JOSEPH J. KEVER

thereupon resumed the stand as a witness in behalf of Plaintiff and was further examined and testified as follows:

Direct Examination
(Continued)

By Mr. Kester:

Q. When the market is down, or when there is an oversupply of hops, what is the situation with respect to complaints on quality?

A. Well, more liable to find some excuse of faulty hops.

Q. From your knowledge of the hop trade generally, Mr. Kever, over a period of years, what has been the practice with respect to whether or not the weighing-in of hops constitutes an acceptance of the hops?

Mr. Kerr: May the record show our objection to that question on the ground that no proper foundation has been laid.

The Court: Overruled, subject to the objection.

A. It has been the practice for years——

The Court: He answered that yesterday.

(Testimony of Joseph J. Kever.)

Mr. Kester: I was not sure that it had been answered.

A. Yes.

Q. In your banking business did you act and did your bank act upon the basis of such trade practice? [90]

A. Yes. We considered hops were sold when they passed over the scales, giving them weight receipts showing the amount of hops they got.

Q. I believe you said you examined the Wellman crop and were familiar with its character and quality. What would you say with respect to whether or not hops of that same character and quality had been generally taken in under this type of contract over the years?

A. I watched that during this time and I would say many a lot was taken in on contracts of that kind; that is, the year 1947.

Q. How would those compare with Wellman's in character?

A. I don't know as to all of them, but I know of some that were even worse with mildew than Wellman's.

Q. They were taken in under a prime-quality contract?

A. Taken in under a prime-quality contract.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. When you refer to hops as having been taken

(Testimony of Joseph J. Kever.)

in under prime-quality contracts, what do you mean by "taken in"? A. Bought and paid for.

Q. At what price?

A. I don't know the price. The market price at that time was 85 cents, when they had an open contract. That was generally [91] known.

Q. Do you know whether or not these hops you refer to were taken in, as you call it, as full contract price?

A. Some of them may have been reduced, yes.

Q. You mean they may have been taken in at a lower price than the contract price?

A. They might have been, yes.

Q. Do you know whether they actually were?

A. I heard of a number of cases that were taken in at full price.

Q. You heard of a number of cases where they were taken in at other than the full price, too?

A. Well, you had a man here yesterday say what he did. His was the same kind.

Q. Mr. Glatt's case?

A. Concerning which Mr. Glatt testified yesterday, yes.

Q. Do you know of an instance where 1947 hops, a 1947 crop of hops, covered by a term contract, was sold by the grower at other than the contract price?

A. I don't remember just now. I couldn't name the party, no.

Q. But the cases you referred to as those where the hops were taken in under contract, in other

(Testimony of Joseph J. Kever.)

words, were those instances where the hops were taken in at reduced prices?

A. You heard that one case yesterday. I don't know.

Q. What do you mean by "weighing-in" of hops? [92]

A. Well, a representative of the buyer is there and he stabs each bale with a trier and he takes samples, the amount of samples that are agreed upon to take or sometimes they may want an extra sample. I don't think a grower will refuse them an extra sample when they want it. I think a buyer wants to get very even samples of the whole lot because he has to satisfy the people he is working for that he is doing the right thing.

Q. Is that what is meant by balancing the hop samples?

A. Yes, they say that. If there is any objection to any bale they don't like, they take it out.

I had an experience myself a number of times. If there is anything wrong with a bale, they set it out and sometimes they go over it a second time. It depends on the market. If the market is pretty good, they don't object to these little faults.

Q. What constitutes actual weighing-in? What is done in connection with weighing in hops?

A. Well, weigh them and mark it on a slip, and the grower gets a slip and the buyer keeps a slip with the weight on.

(Testimony of Joseph J. Kever.)

Q. How do they mark the bales after they weigh them?

A. They put a number on the bales, and they have the Government inspection—generally have that about that time—and they take an inspection sample, and they have a brand——

Q. Does the buyer, then, after the weighing-in of the hops, put his brand mark on the bales? [93]

A. Very seldom; once in a while, yes. When the hops are ready to be shipped, or something like that, they sometimes do that. Otherwise they come back. The buyers deal among themselves, too.

Q. Is it customary for a dealer to pay a grower for hops immediately after weighing-in?

A. Sometimes they will say, "Well, we will send you a check from the office." If you have confidence in the buyer, they do that.

Q. Do you know whether or not in this particular instance the hops had been inspected by the State or the Federal officials, Mr. Smith's cluster hops?

A. You said the Smith hops?

Q. Yes.

Mr. Kester: Smith?

The Court: No. Do you mean Smith or Wellman?

Mr. Kerr: I beg your pardon. Wellman.

Q. Do you know whether or not at the time the Wellman hops were weighed an official State inspection had been made of those hops?

A. I wasn't there.

(Testimony of Joseph J. Kever.)

Q. I beg your pardon?

A. I wasn't there. I wouldn't know.

Q. You were not present when the hops were weighed?

A. I had no financial interest in it. [94]

Q. Were you present when the hops were inspected? A. No, I wasn't there.

Q. You testified that in your opinion weighing constitutes acceptance. A. Right.

Q. Even if the leaf-and-stem content of the hop has not yet been determined?

A. They generally settle that afterwards. Sometimes you can't get the returns; may take two or three weeks to get the return from the State inspection or the Government inspection.

Q. You mean to say a dealer would accept hops without knowing that leaf-and-stem content?

A. Oh, yes, because that is arranged for.

Q. How is that arranged for?

A. In your agreements for sale. It is the custom. It has been the custom for some time.

Q. The Bailiff is handing you Defendant's Exhibit 1-A, which is the contract between the plaintiff and the defendant in this case. Will you point out in that contract the provisions——

A. What do you want me to do?

Q. Do you find any provision in that contract whereby the price is dependent on the leaf-and-stem content?

(Testimony of Joseph J. Kever.)

Mr. Kester: We will stipulate there is no such clause in the contract.

Q. (By Mr. Kerr): Now, where the sale is under a contract which [95] says nothing about leaf-and-stem content, as such—in other words, it is not a sliding-scale contract—would you say the weighing of hops by the buyer, before determination by the Federal and State officials of the leaf-and-stem content of those hops, would constitute an acceptance? A. Oh, yes.

Q. Then you consider that to be an acceptance of the hops irrespective of the fact that the leaf-and-stem content might actually turn out to be——

A. That is done right along.

Q. Then if the leaf-and-stem content develops to be 20 per cent, you consider the dealer, nevertheless, would accept the hops?

A. I wouldn't know what the dealer would do.

Q. But you state that weighing-in is an acceptance? A. It is.

Q. In that instance, would you consider that to be an acceptance?

A. Any time when a dealer has samples, his representative has samples, and he doesn't want to take them then, he would say, "I don't think you had better weigh them." I think he would use his judgment, especially where he had done business with a good, reliable man for many years, as they had done in this case. It is common sense.

Q. It is actually a matter of understanding be-

(Testimony of Joseph J. Kever.)

tween the grower and the dealer at the time as to whether or not the weighing-in is an acceptance?

A. I think that has always happened. I have never seen a case that I know of——

Q. What if the parties agreed before the weighing that the weighing was not to be an acceptance, would you say nevertheless it would be an acceptance?

A. If they had it in writing, I would say then——

Q. What if they did not have it in writing?

A. I don't know. I don't think they did that this year. They had a practice this year of doing the other, as I understood.

Q. What do you mean "they"?

A. The different large buyers.

Q. Do you know of any instance where there had been such an oral agreement before weighing?

A. I know when they take in hops without having that agreement signed——

Q. Just answer my question. Do you know of any instance where there was such an oral agreement before weighing?

A. No, I don't know. I wasn't there.

Q. If there was such an oral agreement, then the weighing-in would not be an acceptance, would it?

A. No, sir; I don't think that has anything to do with it. I don't think so.

Q. Why is it you don't think so?

(Testimony of Joseph J. Kever.)

A. I think when I have been dealing with a concern a long time [97] and they come and weigh them hops and take them in, they know what they are doing; they will be confirmed, especially in a case like this year where there is some question of quality.

Q. You are a grower and I am a dealer, suppose, and I have a contract for your 1948 crop of hops. The time comes for you to deliver the hops to me; you tender them and I say, "Well, Mr. Kever, your hops appear to me to be of poor quality. I have got to take some samples of these and send them East to determine whether the hops come up to contract quality. Therefore, I do not want any possible misunderstanding on this. I will sample them now, take these tenth-bale samples and then, in order to avoid going through them again and trying them and weighing them later, if my principals decide to take them, I am willing to weigh them now, with the understanding, however, that by weighing them I am not accepting them," and then I go ahead—you agree to that and then we weigh them, and assuming that is all oral, would you say the mere fact of this weighing would, nevertheless, be an acceptance?

A. I would say, "Don't stab these hops and don't weigh them until you are satisfied you will take them."

Q. But you say, "Go ahead and weigh the hops."

A. Take what samples you need.

(Testimony of Joseph J. Kever.)

Q. And you say, "Go ahead and weigh them and I will agree with you that will not be an acceptance." Give me a definite answer. If you and I had such an agreement and I then weighed the hops, [98] in your opinion would that constitute an acceptance of the hops?

A. I wouldn't do it.

Q. You are still not answering the question.

A. No, I wouldn't do it.

Q. But if you did do it?

A. I wouldn't do it.

Q. How close a friend of Mr. Wellman's are you? Are you related to Mr. Wellman?

A. No.

Q. You have taken quite an unusual interest in this problem, have you not?

A. I have been interested for a number of years. We always got along fine and he was an outstanding grower, worried about hops, wanted them the best in the country, and anybody that has seen his yard knows that he puts them up perfect, very fine yard. He is an awful hard worker and strictly honest.

Q. You referred to Mr. Wellman's 1947 cluster hops, I believe, as being of average quality for the 1947 season, is that right? A. Yes.

Q. The average of what?

A. Average for the year.

Q. Where? A. Down the Valley.

Q. The Willamette Valley? [99]

(Testimony of Joseph J. Kever.)

A. The Willamette Valley, yes.

Q. How many hops of the Willamette Valley did you see in the bale or samples taken out of the bales?

A. I don't remember that. I saw a good many bales, a good many thousand.

Q. You saw a good many thousand bales?

A. A good many thousand bales, in samples.

Q. Can you tell by looking at the burlap wrapping of the bale what the quality of the hops is?

A. No.

Q. Will you please explain to the Court on what you base your judgment when you say that in your opinion Mr. Wellman's 1947 clusters were of average quality for the Willamette Valley?

A. Well, in the first place, I inspected yards during the season. I was very much interested. I wasn't tied up to any business. I took another hop grower, dealer-grower, with me and we went down the Valley and we took our time; spent two days at different times.

This dealer was interested in what the mildew was doing because he was a buyer. We sized up the hops.

Some yards were very much infected. Some were pretty near rotten with it. We went back and saw Wellman's yard and he says, "Wellman's yard is much better than average," and we made our remarks about that. We talked it over.

Q. When you say Mr. Wellman's 1947 clusters

(Testimony of Joseph J. Kever.)

were equal to the [100] average of the Willamette Valley, you mean the average of these hops on the vines in the yards? A. Yes.

Q. Is that what you mean?

A. That is right.

Q. Do you know whether or not it is customary for buyers of hops to buy hops on the vine, in the green stage?

A. Yes, I know of cases when the market is very short that they have done it. They will do it sometimes.

Q. Buy the hops green on the vine?

A. Oh, yes; even arrange for picking.

Q. And then the dealer goes out and picks them himself?

A. Hires somebody to pick them. They have done that at times.

Q. I see.

A. I have seen times when the buyer will say, "I will give you so much for your yard," and he would arrange to pick them. That has happened a number of times.

Q. When that happened, the buyer went out and picked them himself? A. That is right.

Q. And dried and baled them himself?

A. That is right.

Q. Have you ever grown hops?

A. Well, I didn't go out and do the work. I was a sort of a sidewalk farmer. That is what some of my friends call me. [101]

(Testimony of Joseph J. Kever.)

Q. I didn't get that term.

A. A sidewalk farmer. This fellow that told me that, he was a German or Russian. He said, "You are a sidewalk farmer," and I said, "What is that"? He said, "You try to tell the farmers how to farm."

The Court: There are a lot of sidewalk lawyers, too.

Q. (By Mr. Kerr): Have you ever bought and sold hops?

A. I bought some a few times when they owed the bank and we didn't know what to do with them. I would take them off their hands so they could pay on the debt. I took them personally and held them sometimes two or three years to get my money back, because the market was off, and it came back and I got out of it. Never lost anything by doing that. Didn't make very much, but I did it so they could pay their notes.

Q. You never engaged in the business of buying and selling hops? A. No, I didn't.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. You mentioned comparing Wellman's crop with other crops on the vine. Did you also compare his samples with samples of other crops after picking? A. Oh, yes. [102]

Q. Is your judgment here, according to your

(Testimony of Joseph J. Kever.)

testimony, based also on your examination of those samples? A. That is right.

Mr. Kester: Thank you.

(Witness excused.)

E. F. WILLIG

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Mr. Kester: If the Court please, Mr. Ray, a representative of the Defendant here, has brought into court a quantity of samples which I am advised are samples of the Wellman lot. I don't know that they have been marked, but we have examined them and I am going to refer to them. They are identified as being Sample No. 51. I assume Mr. Ray will further identify them when he testifies.

(Hop Samples were thereupon received in evidence and marked Defendant's Exhibits 11-A to 11-N.)

Direct Examination

By Mr. Kester:

Q. State your name, please.

A. E. F. Willig.

Q. Where do you live?

A. Mt. Angel, Oregon. [103]

Q. What is your business?

A. A farmer, principally, and Manager of the Oregon Hop Producers Cooperative.

(Testimony of E. F. Willig.)

Q. The Oregon Hop Producers Cooperative?

A. Yes.

Q. What is that cooperative? What do you do?

A. Marketing of hops.

Q. Over how large an area does that cooperative operate?

A. Oh, at the present time it probably covers a radius of about twenty miles.

Q. About how many members do you have, off-hand?

A. At the present time we have around nearly thirty members.

Q. What is your general method of operation? Just describe generally how you work?

A. Well, in a sort of a way, just contract with growers.

The Court: It is the usual cooperative plan?

A. Yes.

The Court: Along State and Federal lines?

A. That is right. The hops are delivered to the warehouse and then we sell them for the members.

Q. (By Mr. Kester): During 1947 how many bales of hops did you handle at the Co-op., approximately? A. Very nearly 1200, if I recollect.

Q. Did you have occasion to be familiar with general conditions in the hop market in 1947?

A. I think so. [104]

Q. Were you familiar with the hop crop in Mt. Angel and in the Willamette Valley area in 1947?

A. What?

(Testimony of E. F. Willig.)

Q. The hop crop, the volume or character of it?

A. I think so.

Q. Over how many years have you been engaged in the hop business?

A. I raised my first crop in 1932.

Q. Have you been in the hop business continuously since that time?

A. There was two years I was out of it during that time.

Q. Did you have occasion to examine, here in the courtroom, some of the samples of Mr. Wellman's crop, that have been marked and referred to by No. 11? A. I did.

Q. How would you say, from your examination of these hops, that these hops compared with the average you saw in 1947?

A. I would call them an average hop for that year, except probably the picking. I couldn't call it a clean pick. All the farmers that hand-picked that year had trouble, and the general average was a little on the dirty side.

Q. So they would be about average for that kind and quality of hops and picking, as well?

A. I think so.

Q. Would you say from your experience in selling hops over [105] the years that hops of the same general character and quality of these had been accepted under this type of contract?

A. Yes, they had.

Q. In 1947 to whom did you sell your hops?

(Testimony of E. F. Willig.)

A. Directly to the breweries.

Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?

A. That is about all we had to sell that year in the form of late hops.

Q. Did they accept them and make beer out of them? A. That is right.

Q. Your answer is Yes? A. Yes.

Mr. Kester: That is all.

Cross-Examination

By Mr. Kerr:

Q. Did your cooperative association operate last year? A. They did.

Q. And this year, too? A. Yes.

Q. Approximately what quality of hops did it handle in 1947—what volume, I should say?

A. I think I said nearly 1200 bales, if I remember correctly.

Q. And 1948? [106]

A. Just about the same number of bales.

Q. You refer to the Wellman samples as being an average. An average of what?

A. I beg your pardon?

Q. An average of what?

A. An average of the late cluster crop in that vicinity for 1947.

Q. In that vicinity; you mean in the vicinity of Mt. Angel? A. Yes.

Q. Within a 20-mile radius?

(Testimony of E. F. Willig.)

A. That is what I would say, yes.

Q. Do you know anything about the quality or condition of the hops produced in 1947 in the Yakima Valley area?

A. No, I couldn't state that.

Q. Do you know anything about the quality or condition of late cluster hops produced in Oregon, outside of in the area around Mt. Angel?

A. No, I couldn't state anything about quality.

Q. Do you know anything about the quality and condition of the 1947 cluster hops produced in California?

A. No, I don't.

Q. The Wellman samples do show mildew damage?

A. They do.

Q. Would you say that is a substantial mildew damage?

A. Well, not—as I said before, I just call it average. I [107] have seen samples with much more and I have seen samples with quite a bit less mildew damage than that.

Q. That is the average you mean for 1947?

A. I would think.

Q. You are still referring, when you speak of average, to the Mt. Angel area?

A. Yes.

Q. How would it compare with the average in that area for 1946, as far as mildew damage was concerned?

A. Well, if I remember correctly, we didn't have any mildew damage in 1946 so naturally the quality,

(Testimony of E. F. Willig.)

so far as the color of the sample and the hop would be concerned, was altogether different.

Q. You say, I believe, that the sample is not a sample of a cleanly picked hop, is that right?

A. I don't think you can call that a cleanly picked hop. As I said before, for that year the picking crews were having trouble with hand-picking, such as they did. I think that statistics will bear out that the picking was, on an average, much dirtier in 1947 than it was, for instance, in 1948.

Q. You are again referring to the Mt. Angel area?

A. Yes.

Q. Would you say the Wellman samples are of even color?

A. I have only looked at two different samples. I didn't notice too much difference. [108]

Q. I mean the samples in evidence. Is the sample of an even color?

A. I believe I would say so, yes.

Q. Does it show any brown spots indicating mildew damage?

A. It shows mildew is there. That is quite evident.

Q. Then it is not of even color?

A. Couldn't call it even color, as far as one color was concerned, no.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. Are hops always exactly the same color?

(Testimony of E. F. Willig.)

A. No, I wouldn't say that.

Q. Would you say the color varies from year to year, just like other conditions?

A. It does.

Q. You would sometimes have variations in color within a single crop?

A. Yes, as far as that goes, in different yards they may be of the same form, but they will still have different color, as far as that is concerned.

Q. You have spoken of mildew and you have observed these samples. Is that mildew merely on the outside petals or did it go clear into the core?

A. I don't believe I noticed real mildew damage to the core to any extent except, of course, the nubbins, and they are not considered hops.

Q. As far as the hops themselves are concerned, the mildew appeared on the outside petals?

A. It did.

Mr. Kester: I think that is all.

Recross-Examination

By Mr. Kerr:

Q. Does your cooperative sell direct to breweries? A. It does.

Q. Do you sell through a broker or representative?

A. We have an agent on the East Coast, but our invoicing and all of our business is done right through our office.

Mr. Kerr: That is all.

(Testimony of E. F. Willig.)

Mr. Kester: You were subpoenaed to come here?

A. Yes.

Mr. Kester: That is all.

(Witness excused.) [110]

O. J. SCHLOTTMAN

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Your name is O. J. Schlottman?

A. Yes.

Q. Where do you live, Mr. Schlottman?

A. Mt. Angel.

Q. Are you in the hop business there?

A. Yes.

Q. How big a place do you have?

A. 110 acres.

Q. About what is your average annual production of hops? A. You mean acreage?

Q. No, bales, approximately.

A. Approximately around 100 or 115 bales.

Q. How long have you been in the hop business?

A. Since 1928.

Q. Continuously since that time?

A. Right.

Q. Do you have a hopyard anywhere else but in Mt. Angel?

(Testimony of O. J. Schlottman.)

A. Well, I had a place in Idaho but I sold that to my boys now.

Q. Your boys are operating it now?

A. That is right. [111]

Q. Have you more or less kept track of conditions over there as well as in Oregon?

A. Pretty well so.

Q. Do you recollect the crop conditions in 1947?

A. Yes.

Q. Did you yourself raise a crop of hops in 1947?

A. I did.

Q. Did you have occasion to be familiar with the conditions in hops generally in 1947 in Oregon?

A. I did, in the Valley, yes.

Q. Have you had occasion to examine the samples that were brought into the courtroom of Mr. Wellman's 1947 clusters that were marked Exhibit 11? You have seen some of these samples?

A. I looked at them yesterday.

Q. What would you say with respect to how those samples compared in quality with the general average of the 1947 crop that you observed?

A. Well, what I observed, I would say they was an average hop.

Q. Were you say they were a merchantable hop for 1947?

A. I would say yes.

Q. What would you say with respect to whether or not hops of that same character and quality had been taken in under this type of contract in prior years?

A. I don't understand that.

(Testimony of O. J. Schlottman.)

Q. Have hops of the same general character and quality been [112] accepted by buyers under this type of contract in prior years and in 1947?

A. Well, in prior years I would say they have been.

Q. In 1947 were hops of that same general character accepted under these contracts?

A. Well, I couldn't answer that because I didn't—

Q. But in prior years you had experience with hops of that same kind and character being taken in under these contracts calling for prime quality?

A. Well, I have seen them taken, yes.

Mr. Kester: That is all.

Cross-Examination

By Mr. Kerr:

Q. Were any of your 1947 crop of hops rejected?

A. No.

Q. Do you know of other growers whose hops were rejected?

A. Outside of these here, that is the only ones that I paid any attention to.

Q. Did you hear of any others being rejected? As a matter of fact, a substantial quantity of Oregon's 1947 crop was rejected under contracts, was it not?

A. There was hops rejected on contract, but I couldn't say whose they were.

Q. It is common knowledge that a substantial quantity was rejected, [113] is that not true?

(Testimony of O. J. Schlottman.)

A. These are the only three lots that I really have reference to.

Q. These are the only three lots you have personal knowledge of? A. That is right.

Q. You said samples of the Wellman hops were examined and that the samples of the Wellman hops that you examined here were of average quality. Average of what?

A. Of the Willamette Valley, I would say.

Q. Of the Willamette Valley?

A. Of the Willamette Valley, in the yards that I examined. Of course, these samples are a year and a half old and it would be pretty hard to judge.

Q. Are you basing your opinion as to the comparison of the Wellman samples with other hops grown in the Willamette Valley in 1947 upon your recollection of what you saw in the yards that you visited?

A. Well, more so, yes. I didn't see too many samples without being in the bale.

Q. As a hop grower you know, do you not, that a hop on the vine is not necessarily a hop in the bale. Isn't that true? A. That is true.

Q. And that the condition of the hop on the vine does not necessarily indicate the condition of the same hop in the bale? [114]

A. If it is picked and put in the bale, it would be.

Q. In the same condition as it was on the vine?

A. If it was properly cured and handled, yes.

Q. That is a very big "if," isn't it?

(Testimony of O. J. Schlottman.)

A. Maybe I should not use that word "if," but I would say if it was properly cured and handled it would be the same.

Q. How about wind damage occurring in the yard after you saw the hop on the vine?

A. There is wind whips, what they call that.

Q. How about sack burn; are you familiar with that?

A. There could be.

Q. There could be a mildew attack upon a particular hop cone before it is harvested, but after you saw it, could there not?

A. You mean, after I saw it?

Q. Yes. A. Could be.

Q. Would you say the samples of the Wellman hops you examined showed mildew damage?

A. They do.

Q. Would you say they were cleanly picked?

A. Well, I wouldn't think they was cleanly picked, but they had a sliding scale of 8 per cent—I would presume 8 per cent would be a clean-picked hop, and there is a sliding scale up or down.

Q. 11 per cent is not considered a cleanly picked hop, is it? [115]

A. Well, no, it is not a clean-picked hop but it is a good merchantable hop, I would say.

Q. What do you mean by "merchantable hop"? You mean a salable hop, that there may be a sale for it?

A. A usable hop.

Q. A useful hop?

The Court: A usable hop.

(Testimony of O. J. Schlottman.)

Mr. Kerr: Oh, a usable hop.

Q. Have you sold all your 1947 crop of hops yet? A. No, I have not.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. You were subpoenaed to come here, were you? A. I was.

Mr. Kester: Thank you very much.

(Witness excused.)

Mr. Kester: The plaintiff is willing to rest with the reservation made in the other case as to any amendment that may become necessary to the pleadings.

(Plaintiff rests.) [116]

Mr. Hill: I have here the amended answer that your Honor gave me leave to file. That is in the Smith case and in the present case, the Wellman case. We filed simply a general denial. We filed that at Judge Fee's suggestion following a motion directed to the pleadings. He said, "You can amend at the time of pre-trial."

We request leave to amend our answer in the Wellman case by making a simple allegation of fact, if your Honor will give us permission.

The Court: It may be amended.

Mr. Hill: May I read that into the record?

The Court: That is not necessary; just give it to Counsel and he can read it while you are examining a witness. Do you have a copy?

Mr. Kester: No, your Honor.

Mr. Hill: I will give one to Counsel. [117]

Defendant's Testimony

HAROLD W. RAY

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Harold W. Ray.

Q. You have testified in the two previous cases, have you not? A. I did, yes.

Q. What is your connection with A. J. Ray & Son, Inc.? A. I am President and Manager.

Q. That is a corporation, is it not?

A. It is.

Q. What is the relationship between A. J. Ray & Son and the defendant in this case?

A. A. J. Ray & Son represent the defendant in the purchase of hops in the State of Oregon.

Q. How long has the company represented the defendant?

A. I believe since 1917, but not exclusively that entire time.

Q. When you say that they have represented the defendant, what do you mean?

(Testimony of Harold W. Ray.)

A. I mean that we buy and contract hops for the defendant in the State of Oregon and also look after the shipment of those hops. [118]

Q. And that has been the type of representation throughout the period you mentioned?

A. Yes.

Q. How many people are there in your organization, A. J. Ray & Son?

A. Do you mean stockholders or——

Q. No, I mean employees or officers.

A. Let's see. Seven, I believe.

Q. Will you state who they are?

A. Mr. C. F. Noakes is a stockholder in the company and a director, and is manager of the field office which is at Salem, Oregon. As assistants in the Salem field office we have Mr. Gilbert Davis and Mr. Bud Troxel.

In the Hillsboro office we have Mrs. Anna Townsend, who is secretary and office manager, Miss Catherine Matheson, who is secretary and stenographer, Mr. Walter von der Werth who is the bookkeeper and general assistant in the sample room, and myself.

Q. How long has Mr. Noakes been with the company?

A. I can't remember exactly, but I believe in excess of thirty years. He could tell you, though.

Q. He is in charge of your Salem office?

A. Correct.

Q. How long has he been in charge of that of-

(Testimony of Harold W. Ray.)

Q. fice? A. That I can't remember, Mr. Kerr.

Q. Was he in charge of that office during the year 1947?

A. Oh, yes. He has been there much longer than that.

Q. Were all of the persons you have named with your organization through 1947?

A. Yes.

Q. As the representative of John I. Haas, Inc., have you been authorized to inspect hops which are tendered to your company under prime contracts?

A. Mr. Kerr, when you address a question of that sort to me, you are referring to us as a corporation and not to me as an individual?

Q. Yes, your company.

A. We have, yes. Yes, we are authorized.

Q. You personally do not represent John I. Haas, Inc., in connection with buying hops, is that right? A. I do not, no.

Q. The representation is entirely through the company that you are with, is it?

A. Correct.

Q. Did you cause the 1947 late cluster hops baled by Mr. Wellman to be inspected by your men?

A. I did, yes.

Q. And when was that done?

A. I can't tell you without referring to notes, Mr. Kerr.

Q. Do you have the notes with you? [120]

A. Yes, I think I have. Yes. Just prior to Sep-

(Testimony of Harold W. Ray.)

tember 25th. I can't tell you the exact date. It was a few days in advance of that, as I recall it.

Q. Did you issue instructions to your employees in that connection?

A. I issued instructions to Mr. Noakes.

Q. What were those instructions?

A. I instructed Mr. Noakes to have a talk with Mr. Wellman and have an express understanding and agreement with him that, to facilitate the handling of those contract hops, as to whether or not they would be accepted, that he would be willing to inspect the hops, put a head number on them and weigh them and take tenth-bale samples of them, with the understanding expressly that that did not constitute acceptance of the hops; that the acceptance of the hops had been taken out of our hands by John I. Haas, Inc., and they required that we send tenth-bale inspection samples to them for their inspection and determination as to the quality; and, in order to accomplish that and put these inspection samples in the hands of John I. Haas, Inc., it would be necessary for us to inspect them, and we would weigh them as a matter of convenience in case that some compromise settlement should be reached later, and it would not be necessary to re-weigh the hops at additional expense.

I particularly cautioned Mr. Noakes that he must have that definite understanding with Mr. Wellman that our weighing [121] them and inspect-

(Testimony of Harold W. Ray.)

ing them would not constitute an acceptance of the contract.

Those instructions were exactly in accordance with instructions that I had received from John I. Haas, Inc., and immediately subsequent to the inspection of Mr. Wellman's hops we wrote letters to the other contract growers who had contracts with John I. Haas, Inc., specifying those conditions.

Q. You are being handed Exhibit 12. Will you state, please, what that is?

A. This particular letter is a copy of a letter addressed to Mr. R. M. Walker, Independence, Oregon, and it contains, in substance, exactly what I have just related, that we would be willing to accept—I do not mean that. I mean to inspect, and to take tenth-bale samples and to weigh.

Q. Will you read the letter, please?

A. Yes, I will.

The Court: No. Let's do not do any letter-reading. I will read it myself.

A. All right.

Q. (By Mr. Kerr): Is that the general form of the letter that you refer to as having been sent to other growers?

A. Exactly. They were precisely the same to each of the other growers. That was the general practice. However, we were dealing with Mr. Wellman's hops prior to the time I was instructed to send these letters to growers, but I had that under-

(Testimony of Harold W. Ray.)

standing [122] with Mr. Noakes that it must be done. The letters were being written that day.

Q. Was such a letter addressed to Mr. Wellman? A. It was not.

Q. Why not?

A. Because they were weighing and inspecting Mr. Wellman's hops the day these letters were being written and I told the office,—that is, Mrs. Townsend,—that it was not necessary to send any to Mr. Wellman because his hops were being inspected.

Q. How were those instructions to Mr. Noakes communicated to him?

A. Probably by telephone. I talked with Mr. Noakes on the telephone nearly always once a day and very frequently a number of times a day.

Q. Did Mr. Noakes later make any report to you concerning compliance with your instructions?

A. He advised me that he had complied with those instructions and that he had instructed—that he had inspected and sampled and weighed the Wellman hops, and that Mr. Wellman had agreed to permit that to be done under those conditions.

Q. Do you recall when he reported that to you?

A. He reported that to me on the night of the 25th of September. That was the night of the day that the hops were inspected. When I say “night” I mean evening, after 6:00 o'clock.

Q. Do you recall what samples he took of Mr. Wellman's hops? [123] By that I mean do you recall how many were taken?

(Testimony of Harold W. Ray.)

A. At various times during the season or at the time of inspection, do you refer to?

A. Various times during the season.

A. May I again refer to notes?

Q. You may.

A. You refer to cluster hops or clusters and fuggles, or both?

Q. Clusters only.

A. Clusters only, on the 15th of August they took three samples.

Q. Is that August or September?

A. September, I should say, they took three samples of cluster hops and—Pardon me. That would have been on the 13th or 14th. The 15th was the day we received the samples in our office at Hillsboro, and on the 25th of September they took 19 samples of the cluster hops, then, inspection samples.

Q. Were those inspection samples numbered?

A. They were not numbered when they came to our office. I mean they were not lot-numbered. They had Mr. Wellman's name, the number of bales, marked on the samples.

Q. Was a lot number assigned to them later?

A. A lot number was assigned in our office. It had been assigned when we received the first sample of the cluster hops.

Q. What was that lot number?

A. Lot No. 51.

(Testimony of Harold W. Ray.)

Q. There will be handed to you Exhibits 3-E and 3-J. [124] A. Yes.

Q. Referring to 3-E—

A. That is a copy—No, wait a minute. It is the original Hot Sample Advice addressed to John I. Haas, Inc., Washington, D. C., listing the number of samples that were sent to them by prepaid express on September 15th, and among those samples were three samples of No. 51 clusters, the Wellman hops.

Q. Was there one sample of No. 52?

A. Yes, there was one sample of No. 52.

Q. Were those Wellman clusters?

A. 32 bales. They were so indicated at that time. The sample came in to us marked "Wellman," 64 bales total; 32 bales, one-half of which we had under contract.

Q. Did you receive a report from your field man explaining how he took different samples, why there was one sample of 32 bales?

A. Yes, there was one sample—these two lots made up 64 bales total. This 32 bales was an estimate by Mr. Wellman of the number of bales of hops he would have like that sample, which were of much better quality than the other hops, the other cluster hops, and apparently picked from a certain yard or a portion of a certain yard, and later, when they were about to inspect the hops, they were unable to find that 32 bales, or that 64 bales, in the whole lot, and Mr. Wellman at that

(Testimony of Harold W. Ray.)

time stated that he had been obliged, by lack of storage room, to mix the other cluster hops in with those hops which had been picked, which he thought was going to make 64 bales, and, therefore, [125] the 32 bales had disappeared and we canceled the sample from the record.

Q. The samples referred to in the Sample Advice of September 15th, Exhibit 3-E, were they taken after the hops had been baled or before?

A. After. They had to be baled, or we could not take the samples, but there were only a small number of bales made at that time.

Q. Will you refer to Exhibit 3-J?

A. Yes. 3-J is the original Sample Advice memorandum addressed to John I. Haas, Inc., Washington, D. C., under date of September 26th, in which they were advised that we were sending to them on that date 19 samples No. 51, representing 193 bales of Oregon clusters, Wellman contract hops, Code No. G-99-A, and also included another lot of hops, other than the Wellman clusters.

Q. Those 19 samples are so-called tenth-bale samples, are they?

A. Yes, sir; those were tenth-bale samples.

Q. Was each of those samples brought to your office by your field man?

A. It was not, no. They were sent to our office from the Salem office by express.

Q. They did not come through your Hillsboro office?

A. How is that?

(Testimony of Harold W. Ray.)

Q. Did you go into your Hillsboro office?

A. Yes, they were sent by express from Salem, from the Salem [126] office to the Hillsboro office.

Q. What was done with them at the Hillsboro office?

A. The hops were examined by myself and Mr. von der Werth, and they were split and approximately one-half of each of the 19 samples was forwarded by express to John I. Haas, Inc., marked as this exhibit indicates.

Q. That was approximately one-half of each sample, is that right? A. Yes.

Q. Were those samples returned later?

A. No, they were not. We never requested that they be returned.

Q. What are the samples you have in the courtroom now, that you have brought in?

A. Well, as I have just said, those are one-half of the samples, or approximately one-half of each of the original 19 inspection samples of the Wellman cluster hops.

Q. Referring again to Exhibit 3-J, I call your attention to the typewritten material towards the bottom of the page after the printed word "Note."

A. Yes.

Q. What is the meaning of that comment?

A. "These Wellman contract hops have been weighed, inspected and sampled preparatory to settlement but no basis has been reached. Please

(Testimony of Harold W. Ray.)

note these are tenth-bale samples on the clusters.”

I did not write that.

Q. Who did? [127]

A. Mrs. Townsend.

Q. She was in your Hillsboro office, is that right?

A. Yes.

Q. Do you know what it means?

A. I know what the intent was.

Q. Will you state the intent.

A. The intent was to advise them that we had inspected and sampled and weighed those Wellman hops, without committing ourselves or without committing John I. Haas, Inc., to the acceptance of the hops, in accordance with their instructions.

Mr. Kerr: Will Counsel stipulate that these samples which this witness has referred to as having been brought into court by him are marked Exhibits 11-A to 11-N?

Mr. Kester: If Counsel says that is the fact, we are willing to so stipulate.

Q. (By Mr. Kerr): The samples referred to are the ones on the window sill?

A. I don't know whether they are or not. I can't see them. They were over there. I presume that they are still there.

Q. Referring now to Exhibit 3-A,—

A. Yes.

Q. —what was the occasion for your sending that wire?

A. This wire was dated Hillsboro, August 13th,

(Testimony of Harold W. Ray.)

and addressed to John I. Haas, Inc., Washington, D. C., and it was the result of telephone information from our Salem office or, in other [128] words, from Mr. Noakes, stating that weather conditions were unfavorable and expressing doubt as to whether the Wellman and Stroda clusters would be harvested.

Q. Was that based upon some report? Was that based upon some report from your field man?

A. That was based upon a report from Mr. Noakes.

Q. Referring now to Exhibit 3-C,—

A. Yes.

Q. —is that a letter of instruction from John I. Haas, Inc., main office?

A. Well, wait until I read it, Mr. Kerr. Now, what is the question, please?

Q. I will withdraw the previous question. Was your company authorized to determine the amount of advances to be paid growers under prime contracts?

A. Yes. That was the general practice over many years, that we had the authority to handle those advances according to our judgment, and this particular letter apparently refers to—Wait.

We had previously wired them that Wellman might not have any cluster hops, and the next thing he knows we have paid Mr. Wellman harvesting advances and he probably wants to know why. This letter was from the Treasurer of the company.

(Testimony of Harold W. Ray.)

Q. Can you state why, in view of the previous reports you had made to the Washington office that Mr. Wellman probably would [129] have few, if any, clusters, you nevertheless made advances to him?

A. Yes, I can, because later Mr. Noakes advised me that he thought Mr. Wellman was going to have a harvest, that he would require some harvesting advances, he thought, and he inquired of me if it would be satisfactory to make them, and I told him that if Mr. Wellman was going to harvest some cluster hops and wanted an advance for him to advance a sum that in his judgment would be safe and proper.

Q. Do you know whether or not there was an advance to Mr. Wellman on his cluster hop crop for the amount of the advances referred to in the contract?

A. The full amount was not advanced on the cluster hops.

Q. Why not?

A. Because it was anticipated that the quantity and the crop would be materially reduced.

Q. Reduced by what?

A. By reason of mildew damage and disease, leaving a considerable portion of the crop unharvested.

Q. Was it your supposition at that time that a considerable portion of his crop would be left unharvested?

(Testimony of Harold W. Ray.)

A. It appeared to be very likely from the reports that I received.

Q. Did you have any discussion with him or did your office, to your knowledge, have any communication with Mr. Wellman? That is, [130] concerning the possibility of selective picking of the 1947 clusters?

A. I will answer that in this way: I will not answer definitely about that, but there was some talk about it, I understood. Mr. Noakes telephoned to me and asked me if John I. Haas, Inc., would be willing to pay Mr. Wellman an increased price over that indicated by the contract or, in other words, a premium over the market price if he could selectively pick the hops, so that they would keep out the mildewed hops.

I discussed the matter with John I. Haas, Inc., and it was their attitude that the market was sufficiently high and that any such cost as that should be borne by the grower entirely and that they would not be willing to increase the price for that purpose.

Q. Will you refer to Exhibit 3-D?

A. Yes.

Q. And particularly to the last paragraph?

A. Yes.

Q. Do you recall whether or not that was your first advice to the Washington office that there would be some Wellman clusters for delivery?

A. I believe that was the first written advice that we had given them, but I think Mr. John I.

(Testimony of Harold W. Ray.)

Haas was here in Portland late in August and I think I told him verbally that it appeared likely at that time that Wellman would pick at least a part of [131] his cluster hops, but I think that this, which is a letter dated September 10th, in which we reported to them that we were drawing a sight draft on them to cover advances made to several growers including \$5,000 for Mr. Wellman—I think that was the first written advice to their office by our concern that there would be some cluster hops.

Q. Will you refer now to Exhibit 3-F?

A. Yes. Do you want me to read this?

Q. I believe it is not necessary, but what is meant in that telegram about willingness to fix the price on clusters on a sliding-scale basis?

A. This contract stated—I might as well read that portion of it. It explains it better than I can. “In order to clarify matters regarding floor contracts, willing to fix price of clusters at 85 cents on sliding-scale basis.” That means a sliding scale for pickers.

Q. What is meant by “fix price”?

A. The contract provides, what we call open-end contracts—they give the grower the privilege of selecting a price between certain dates, which is supposed to represent the price of prime quality hops on the Oregon market as of that date, and if that price is higher than the floor price stated in the contract, that would be the price fixed for prime-quality hops in accordance with the terms

(Testimony of Harold W. Ray.)

of the contract. That means the grower selects a certain price as of a certain date. If we agree that that was the price on that date for a prime-quality hop, we confirm that to the grower. That fixing of a price does not mean that they agree to take hops if they are not up to the contract specifications of quality.

Q. With respect specifically to the Wellman cluster contract, there was no sliding-scale basis figured in the contract?

A. No, there wasn't.

Q. What was the buyer willing to accept as the grower's market price for a particular date the price for hops of contract quality with the particular leaf-and-stem content——

A. That is a rather difficult question to understand.

Q. Then, will you explain what was meant by the reference in this wire to fixing the price of clusters on a sliding-scale basis?

A. It meant that they were willing to confirm to the growers who selected 85 cents as the market price during a certain period for prime-quality cluster hops, 1947 crop, that they were willing to confirm that price, but the hops must be of the kind and quality specified in the contract. That is exactly what it meant. In other words, they were not saying, "We will take these hops at 85 cents a pound sliding scale if they are not up to contract." They would not agree to that.

(Testimony of Harold W. Ray.)

Q. Did it mean if the grower's hops came up to a pick of 20 per cent that the hops would be accepted?

A. Certainly not. That had nothing to do with saying that they [133] were going to take the hops. It simply confirmed that that was the market price on that day for a prime-quality hop. If they had prime-quality hops, that would be the price. If they did not have prime-quality hops they might not even take them at all. That 85-cent sliding scale was the market price as of those dates.

Q. For what percentage of pick?

A. For prime-quality hops.

Q. What percentage of pick?

A. Based on 8-per cent picking. If the grower had a 6-per cent pick, he would have obtained a premium of 2 cents a pound over the 85 cents.

Q. If he had an 11-per cent pick, what was he entitled to?

A. If he had an 11-per cent pick, they would not be a cleanly picked hop and they would not have accepted them.

Q. That is the meaning of this wire, as you understand it?

A. It was.

Q. Now, I refer you to Exhibit 3-G.

A. Yes.

Q. Do you recall the meaning of the first sentence?

A. You mean the first line of the telegram?

Q. Yes.

(Testimony of Harold W. Ray.)

A. It says: "Other growers position no discount for poor quality ridiculous."

I don't know exactly what it means. I can't recall [134] exactly what it means, but naturally I think that it means that on that date, either in a telephone conversation or in some manner, I told them that some growers were saying that they could deliver what we can call poor quality without a discount, and they say in this telegram, "Other growers position no discount for poor quality ridiculous."

Q. Will you refer to Exhibit 3-I.

A. Yes. Do you want me to read it?

Q. No, that is not necessary. Was that confirmation of the receipt by you of instructions of John I. Haas, Inc., not to weigh or inspect hops without an understanding with the growers that this would not constitute acceptance of the hops?

A. Yes. This was advice that we should attempt to proceed upon that basis.

Q. Exhibit 3-H, is that a memorandum of the wire which appears as Exhibit 3-I?

A. Correct, yes.

Q. A decoding of the wire that appears in Exhibit 3-I?

A. I would personally guarantee it as being a correct decoding. I have the code book, if it is necessary to refer to it. The telegram, which is Exhibit 3-I, is properly decoded. You want me to read the decoding?

(Testimony of Harold W. Ray.)

Q. Yes, if you will, please.

A. "Retel date will attempt proceed inspect sample and weigh all floor and high-priced contracts with distinct understanding [135] with growers this does not constitute acceptance of hops. Will send inspection sample as fast as possible. What shall we do regarding 40 to 50-cent fixed on sliding-scale contracts? Do not think it advisable try make additional settlements until they are definite and final."

When I refer to "final" or to "settlements," I mean it is not a settlement but it is a price, a market price determined on confirmation. We had previously been more or less soliciting growers to fix that price, and in this telegram say, "Do not think it advisable try make additional settlements until they are definite and final."

"Having seen the hops might jeopardize our position. If growers demand settlement, will settle tentatively subject quality condition contract."

Q. Again, where you refer to "settlement" you mean the agreement as to what it was?

A. That is exactly what I mean. It was a determination of that open-end contract price.

"Will follow your instructions regarding payment growers. Believe Steiner also acting with caution on high contracts."

That is the decoding of that exhibit, No. 3-I.

Q. Prior to the date of that telegram, had you been directed by John I. Haas, Inc., to obtain from

(Testimony of Harold W. Ray.)

each grower whose hops you were going to sample, inspect and weigh an understanding [136] that such would not constitute acceptance of those hops?

(Question read.)

A. I had received such instructions, yes, prior to this, and this was the confirmation. I said we would attempt to do so.

Q. Did you examine the samples of the Wellman clusters when they were delivered to your Hillsboro office? A. Yes, I did.

Q. Did you personally examine each sample?

A. I did, yes.

Q. Do you recall the appearance and condition of these samples at that time?

A. Yes, in a general way. There are no marks of identification as between the samples. In other words, the samples are not numbered Bale So-and-So or Bale So-and-So. There are just 19 samples which were drawn from tenth-bales in the crop, but I can remember as a whole exactly what the hops were like, in my opinion.

Q. Will you state what the appearance and condition of those samples was at that time?

A. Yes. The hops were, first, dirty picked, very dirty picked. They were damaged with mildew principally by the content of brown mildewed nubbins in the hops. The fully developed cones were not so badly marked. The hops were of green color. There were large flaky portions, and, in my opinion, they were not well [137] filled with lupulin. The

(Testimony of Harold W. Ray.)

damage in appearance by reason of the picking and by reason of the large content of brown nubbins made the samples or the hops themselves very undesirable hops on the basis of eye inspection.

Q. You advised John I. Haas, Inc., of your opinion of these hops at that time, did you?

A. I think I wrote a letter explaining my opinion, and I might say in writing those letters to them we were attempting to assist the grower as much as possible. I was not trying to make them look worse than they were. I wanted to try to help them a little, if I could.

Q. Would you say you were inclined to give the grower the benefit of any doubt?

A. I was trying to be of assistance to the grower. The growers are our customers. Our income depends upon the growers, and we wanted to serve the growers to the best of our ability.

Q. Was it at any time your opinion and your judgment that those samples shoed prime-quality hops?

A. You would have to state that question differently, Mr. Kerr, before I will care to answer it.

Q. When you first viewed those samples, was it your opinion at that time they were of prime quality?

A. It was not my opinion that they were of prime quality, but with reference to your former question there might be, in fact, prime-quality hops

(Testimony of Harold W. Ray.)

in the sample; but, as a whole, they were not [138] prime quality.

Q. Do you recall any one of the individual samples which did come up to prime quality?

A. There was no one sample that came up to a prime-quality hop.

Q. Did those samples indicate a failure to cleanly pick? A. They were dirty picked.

Q. What, in your opinion, constitutes, in value of percentage, a dirty picked hop?

A. In my opinion, a hop must be 6 per cent to be cleanly picked, a cleanly picked hop, and anything over that would be a dirty picked hop; but the trade practice in 1947 was 8 per cent, which was considered medium—whether it went up or down, 8 per cent was called a cleanly picked hop for the purpose of the sliding scale, and the grading of the price up or down.

(Recess.)

Q. (By Mr. Kerr): Is it your judgment anything over 8 per cent—anything over 6 per cent is a dirty picked hop?

A. That is my judgment, as I stated, in previous years. In 1947 it was the general practice that 8 per cent was considered the limitation of a cleanly picked hop. Anything above 8 per cent would have been dirty picking.

Q. There will be handed to you now Exhibits 8, 7, 5 and 6——

The Court: Bring them here.

(Testimony of Harold W. Ray.)

Q. (By Mr. Kerr): When these are handed to you, will you please [139] examine them and state whether or not the words and figures which appear thereon, in pencil or in ink above the typewritten words or figures are the correct decodings of the particular words involved?

The Court: Who wrote the words on there?

A. Different persons; someone in my office. I will guarantee the decodings of the messages, that they are correct, all of them.

Q. (By Mr. Kerr): Do you find there instructions to you to obtain from growers an understanding, or understandings or agreements that your weighing of the hops will not constitute an acceptance of those hops?

A. Are you going to refer to a particular exhibit?

Q. There is a telegram there, is there not, that refers to your obtaining understandings with growers concerning the weighing-in of their hops?

A. Yes, there is. That is marked Exhibit No. 5, I think.

Q. Is that the instruction you referred to in your previous testimony?

A. It undoubtedly is, yes. Yes, it is.

Q. Do you recall whether or not you had any telephone conversation with anyone in the Washington office on that subject, up to the time of that telegram?

Mr. Kester. What is the date?

(Testimony of Harold W. Ray.)

A. The date is September 25th. I cannot answer that for certain, [140] Mr. Kerr. It may be. We have frequent telephone conversations with the Washington office, and it is very probable that we had, but I can't say definitely as of approximately this date. Do you wish a portion of this telegram read?

Mr. Kerr: No, that is not necessary.

Q. You are being handed Exhibit 3-U.

A. Yes.

Q. Who made the notations in the lower part of that exhibit, in the right-hand corner, if you know?

A. By the writing I know it was Mrs. Townsend.

Q. Do you remember having seen that letter when it came into the office? A. Yes.

Q. Does that letter contain instructions to you relative to the rejection of the Wellman clusters? Will you hand it to the Judge?

The Court: Finish your answer first.

A. Yes, it is what I would say a tentative order in connection with the rejection of the Wellman clusters.

Q. (By Mr. Kerr): Do you recall what you did when you received that letter; that is, what your action was with respect to the rejection of the Wellman clusters?

A. I want to look at it again before I answer that question.

The Court: Yes.

(Testimony of Harold W. Ray.)

A. I called up Mr. Noakes at the Salem office and informed him [141] of this letter. They had previously instructed us to take over the Wellman fuggle hops, that they would accept those on the contract. The Salem office advised that Mr. Wellman was away and that they could not reach him and could not accomplish that duty but would contact him as soon as he returned.

Q. Did you give Mr. Noakes any instructions relative to communicating this objection to Mr. Wellman?

A. Yes, I did. I certainly did.

Q. What were your instructions?

A. I instructed him to accept the Wellman fuggle hops, to reject the Wellman cluster hops, to pay Mr. Wellman for the fuggle hops and deduct the entire advances from the proceeds of the fuggle hops.

Q. Were those advances on both clusters and fuggles?

A. Yes, on both fuggles and clusters.

Q. What did Mr. Noakes tell you? Did he state he would carry out the instructions, or was there any comment made by him at that time?

A. He said he would do so. In all the years he has been with me I have never known him to fail to carry out any instructions I gave him.

Q. Do you definitely now recall having given him those instructions? A. I do, sir. [142]

Q. How were they communicated to Mr. Noakes?

(Testimony of Harold W. Ray.)

A. I not only gave him those instructions once, but I talked with him about it several times.

Q. Do you recall how you communicated your original instructions to him?

A. By telephone.

Q. Referring to Exhibit 3-V—— A. 3-V?

Q. Yes. A. Yes.

Q. ——whose signature appears on that letter?

A. There isn't anybody's signature on this copy, but I signed it. It has my initials. I dictated the letter and no doubt signed it.

Q. What is the date of that letter?

A. October 22, 1947.

Q. What is that letter?

A. That is a letter to John I. Haas & Co.—John I. Haas Co., Inc., to the attention of Mr. Walter Rauber. Mr. Rauber is Vice-President and General Office Manager of John I. Haas, Inc., Washington, D. C. It states: "Referring to the Wellman contract, Mr. Wellman is still away and is expected to return this Friday night, October 24th, and we will contact him the following day if possible and make settlement by taking over the fuggles and rejecting the clusters. Howard Eismann of Steiner's has informed [143] us that they will accept these fuggles as part delivery on the thousand-bale deal." That refers to something else. I would like to explain that.

Q. Very well. Proceed.

A. John I. Haas, Inc., had 1,000 bales of fuggles

(Testimony of Harold W. Ray.)

sold to Anheuser-Busch Brewing Company, St. Louis, and, shortly before harvest time Anheuser-Busch sold these 1,000 bales of fuggle hops to S. S. Steiner & Co., in which there was a trade for imported hops. In other words, Steiner & Co. were supplying them with a quantity of imported hops and, in return for them, Anheuser-Bush was selling to Steiner this 1,000-bale lot of fuggles that John I. Haas, Inc., had sold to them.

We were instructed by John I. Haas, Inc., upon request of Anheuser-Busch Brewing Company, that we make delivery of this 1,000-bale lot of hops here in Oregon to a representative of S. S. Steiner & Co., so that Steiner and Haas have had nothing to do with each other in the field.

Q. Did you receive any report from Mr. Noakes relative to his carrying out your instructions to reject the Wellman clusters?

A. Prior to that time or——

Q. At any time thereafter.

A. When I gave him the instructions to do so, he confirmed to me that he would do so.

Q. Did he later report that he had done so?

A. He later reported that he had done so. [144]

Q. Do you recall when that was?

A. May I refer again to the notes?

Q. Yes.

A. He reported to me the evening after dinner on October 28th that he had accepted Wellman's fuggle hops, that he had rejected his cluster hops,

(Testimony of Harold W. Ray.)

and that he had paid him for the fuggles and had deducted all the advances on both the fuggle and cluster hops in making payment and had given Mr. Wellman a check for \$842.20 balance.

Q. Mr. Noakes was authorized to draw checks on the A. J. Ray & Son account, was he?

A. Yes.

Q. Did you receive another or a subsequent letter from John I. Haas, Inc., confirming their previous instructions to reject the Wellman clusters? I refer you to Exhibit 3-W. Is that the letter of October 30th?

A. October 30th, that letter is signed.

Q. Yes. I invite your attention to the third page thereof.

A. Yes, on the third page. That letter deals with quite a large number of different growers' contracts.

On the third page it says: "Wellman, Sample No. 51: We confirm our instructions to reject these hops. They are extremely poor, and the picking is certainly dirtier than the 11 per cent indicated on the official analysis. Inasmuch as we got our advances back by taking over his fuggles, we are [145] in the clear on this rejection."

Q. That was respecting Mr. Noakes' report that he had carried out your instructions to reject the Wellman clusters. Did you report that in turn to John I. Haas, Inc.?

A. Yes, we did.

Q. Will you refer to Exhibit 3-Y?

A. Yes.

(Testimony of Harold W. Ray.)

Q. That is dated when?

A. A letter of November 1, 1947.

Q. Whose signature appears on that letter?

A. Mrs. A. L. Townsend's signature.

Q. Is that the Mrs. Townsend previously identified with your organization? A. It is.

Q. Is she now in your organization?

A. She is. She is present in the courtroom.

The Court: Would you like to adjourn until Monday afternoon or Tuesday morning?

(Discussion off the record.)

The Court: Tuesday morning at 10:00 o'clock, then.

(Thereupon an adjournment was taken until 10:00 o'clock a.m., Tuesday, February 1, 1949.)

10:00 o'Clock A.M., Tuesday, February 1, 1949

HAROLD W. RAY

a witness in behalf of Defendant, having been previously duly sworn, thereupon resumed the stand and was further examined and testified as follows:

Mr. Kerr: If the Court please, your Honor will recall last week—I believe it was on Thursday—I stated that the defendant desired to have one of the officers of the defendant organization here as a witness. Last evening I received the following telegram addressed to me by John I. Haas, Inc.:

“We regret none of our officers have been able to reach Portland in order to testify in the current court proceeding. Mr. Robert was booked for air

(Testimony of Harold W. Ray.)

passage Thursday, Friday and Saturday and, due to weather complications in the East, all flights were canceled. His flight for Sunday, January 30th, to Portland, was canceled because of the death of his brother."

I understand his brother was an officer in the Navy and was killed in an accident.

"Is it possible to arrange postponement to secure deposition here," and so on. We do not suggest a deposition but, if it would meet with the Court's pleasure, we would like to continue the case, after the conclusion of our [147] testimony this afternoon, to Friday, when we will be able to put Mr. Rauber on the stand. I do not state, your Honor, that Mr. Rauber's testimony is essential. However, I believe it would be helpful. He would testify as to the examination of the hop samples in the Washington, D. C., office.

The Court: You would not object to that, would you?

Mr. Kester: Whatever the Court wishes. I would like to know a little bit about what they expect to prove by him.

The Court: Did you catch what he just said?

Mr. Kester: Is that all?

Mr. Kerr: And also as to the authority of A. J. Ray & Son to act for the defendant in this transaction, specifically with respect to the rejection of the hops.

(Testimony of Harold W. Ray.)

The Court: We have a hearing Saturday morning, Mr. Kerr.

Mr. Kerr: We plan on having our argument immediately following that testimony.

The Court: As I said before, it does not make any difference to me. You can go ahead this week and argue your case. I would rather that you settled that between you as to when you want to argue.

Mr. Kester: I would only make this observation——

The Court: Let's don't start to postpone it until we get through with what we have immediately before us. Let us hear the testimony we have. [148]

Direct Examination—(Continued)

By Mr. Kerr:

Q. There has been handed to you by the Bailiff Exhibit 12. Can you tell from an examination of that who typed the letter? A. Yes.

Q. Who was that?

A. Miss Catherine Matheson.

Q. She is the stenographer in your office you previously identified? A. Yes.

Q. Was such a letter sent to Mr. Wellman?

A. No, it was not.

Q. Why not?

A. Because my instructions from John I. Haas, Inc., to send out such a letter were not received until the day that Mr. Noakes and his assistants were to inspect and sample the Wellman hops. Mr. Wellman had requested that they do the inspecting

(Testimony of Harold W. Ray.)

and sampling promptly in order that he might go hunting, and this letter was not mailed out until the evening of the day that Mr. Wellman's hops had been inspected.

Q. What instructions did you give to Mr. Noakes relative to the sampling and inspecting and weighing of Mr. Wellman's cluster hops?

A. Due to the fact that I realized the importance of the matter and that these letters had not been mailed out, I instructed [149] Mr. Noakes very specifically and definitely that before he could inspect the samples or weigh Mr. Wellman's hops that he positively must have an understanding and agreement with Mr. Wellman that would permit us to do that without it constituting an acceptance of the hops on the contract, because we had no authority to accept hops from John I. Haas, Inc., and would have to submit these tenth-bale samples for their inspection and their decision as to what to do with them.

Q. By "their inspection and their decision" you mean whose inspection and whose decision?

A. John I. Haas, Inc.

Q. Located where?

A. In Washington, D. C.

Q. When did you first give such instructions to Mr. Noakes?

A. I gave these instructions to Mr. Noakes several times prior to the date that they actually inspected the hops. I did not only give them in

(Testimony of Harold W. Ray.)

connection with Mr. Wellman's particularly but any other cases that might arise, that under no circumstances were they to inspect, sample or weigh any of the contract hops without an understanding with them that that did not constitute an acceptance, because we did not have the authority to accept.

Q. By "understanding" you mean an understanding with whom?

A. With the various growers. Mr. Wellman, I am speaking of at the moment, but I also gave Mr. Noakes these instructions with respect to any other growers who had requested inspection [150] of their hops.

The Court: There is a lot in this case about apparent authority. Inasmuch as we are not trying it under a pre-trial order, I don't know whether that question needs to be explained or not. I mention it to you for whatever value it may strike you as having.

Q. (By Mr. Kerr): Did you also give such instructions to Mr. Noakes specifically with reference to the Wellman cluster hops? A. I did, yes.

Q. How were those instructions communicated to Mr. Noakes? A. By telephone.

Q. From where?

A. From my office and also from my home. During the active season, the hop season, I talked with Mr. Noakes almost every evening after dinner, after the field men were in from the country, and he

(Testimony of Harold W. Ray.)

again reported to me what transpired during the day. That is in addition to the frequent telephone conversations during the day that I had with Mr. Noakes in the Salem office.

Q. Was there any one of these conversations with Mr. Noakes relative to the weighing of the Wellman clusters during office hours in your office?

A. Yes, lots of them; not only once but several times.

Q. What report did you get from Mr. Noakes relative to his [151] carrying out those instructions?

A. On the night of September 25th he reported to me that he had inspected and sampled and weighed Mr. Wellman's hops, both fuggles and clusters, with the express understanding and agreement with Mr. Wellman that he understood that that did not constitute an acceptance of these hops, and that he permitted us to inspect, weigh and sample them upon that basis.

Q. On September 25th did you know what the official analysis of the leaf-and-stem content of the Wellman clusters revealed?

A. No, I didn't. I understand that the State inspection service or the State and Federal services drew samples from the bales at the same time or on the same day that Mr. Noakes and his assistants were inspecting the hops.

The Court: There isn't any evidence in the case by way of explanation, as yet, as to what the State requirements are. I do not know to what extent the State acted in this case.

(Testimony of Harold W. Ray.)

Mr. Kerr: Yes.

Q. Mr. Ray, can you explain the nature of that determination by the Government officials of the leaf-and-stem content of hops in Oregon? How was that determined?

(Question read.)

A. There has been a custom since the advent of the OPA ceiling prices on hops to have an official analysis of every lot of hops grown on the Pacific Coast, to determine the percentage of extraneous matter, which consists principally of stems and [152] leaves, and also the percentage of seed, because a great many contracts are for seedless or semi-seedless hops, so that the analysis is necessary, and during the period of the OPA the ceiling price was based upon the extraneous matter content of the hops.

Q. (By Mr. Kerr): What do you mean by extraneous content?

A. It means leaves and stems or any other foreign matter that might be in the hops that should not be there.

After the expiration of the OPA ceiling prices, the trade was favorable to having that practice of official analyses continued, and all contracts, I believe, provide that the determination of the picking,—that is, the leaf-and-stem content,—and also the determination of the seed content of the hops shall be decided by this inspection, which is a joint

(Testimony of Harold W. Ray.)

United States Department of Agriculture and Oregon State Department of Agriculture proceeding.

Q. That analysis of leaf, stem and seed content of hops developed as a result of OPA?

A. Yes, it did.

Q. When was the first analysis made?

A. I believe, Mr. Kerr, that it was the season of 1944, the 1944 crop year. I have not checked my records to refresh my memory, but I believe that was the first year of the OPA ceiling prices.

Q. In 1947 was it the custom in the hop trade to accept that [153] determination by the Federal and State inspection services of leaf, stem and seed content? A. Yes, it was.

Q. Do you know whether or not that is the United States Department of Agriculture, Production and Marketing Administration?

A. They have charge of that inspection service but, as I understand it, the actual work of making those determinations, at least here in Oregon, is carried on by the State of Oregon Department of Agriculture, but under the jurisdiction, and otherwise of the U.S.D.A.

Q. Do you know what gentleman is in charge of that, the name of the gentleman?

A. I believe Mr. Whitlock. He is with the United States Department of Agriculture and is chief of this inspection division, I believe.

Q. Is that the Mr. Whitlock who testified in a previous case here? A. Yes.

(Testimony of Harold W. Ray.)

Q. The Bailiff will hand you Exhibit 13. Do you know the method followed by the Government men in taking samples for that inspection or analysis?

A. I knew the general method.

Q. Will you refer to the exhibit which has been handed to you, which bears the printed heading of the United States Department of Agriculture——

A. Yes.

Q. ——and state whether or not that is the type of certificate which is made out by the Government officials relative to their determination of the leaf, seed and stem content? A. Yes, it is.

Q. That is Exhibit what?

A. Exhibit—looks like Exhibit No. 1.

Q. Exhibit No. 1, is it not? A. Yes.

Q. Is that the certificate which relates to the Wellman 1947 cluster hops?

A. That is correct. It does not state Mr. Wellman's name.

Q. How can you determine whether or not that is Mr. Wellman's?

A. Because this inspection service allots to each grower in the state a code number, and Mr. Wellman's code number for cluster hops is G-99-A.

Mr. Kester: We will agree that the certificate relates to Mr. Wellman's hops.

Mr. Kerr: Very well.

A. This is the original certificate.

Q. This extraneous matter you refer to as being reported by the certificate, as a result of the Gov-

(Testimony of Harold W. Ray.)

ernment analysis, does that include such matter as nubbins or blighted hops?

A. No, it does not include that. That is my understanding, that it does not. [155]

Q. To your knowledge, does the United States Department of Agriculture issue reports on leaf, stem and seed content of hops in each season, as determined by their analyses?

A. Yes, they do, in their market reports.

Q. Will you refer to the telegram that was previously handed to you, Mr. Ray——

A. Yes.

Q. That is Exhibit what? A. Exhibit 3-O.

Q. 3-O? A. Yes.

Q. You refer there to the Wellman hops, do you not? A. Yes, I do.

Q. Will you read the specific reference to the Wellman clusters, 1947 hops?

A. It is dated October 4, 1947, and the reference to the Wellman hops is: "We inspected Wellman fuggle clusters without commitments. Forwarded inspection samples twenty-sixth."

This was apparently in answer to a telegram or inquiry as to whether or not this had been done.

Q. What is meant by the term "without commitments"? What is meant by that term, as used in that telegram?

A. Without committing J. I. Haas, Inc., to the acceptance of those clusters with the fuggle hops. In other words, this was the form that we used in wiring John I. Haas, Inc., that we had [156] in-

(Testimony of Harold W. Ray.)

spected the samples and weighed these hops, without agreeing to accept them on the contract.

Q. Thereafter did you give Mr. Noakes instructions to reject the 1947 Wellman clusters?

A. I did. I can't state the exact date, Mr. Kerr. I think I gave him the instructions immediately following the receipt of instructions to me from John I. Haas, Inc. I believe you have an exhibit there——

Q. The Bailiff will hand you Exhibit 3-U. I will ask you if those are the instructions from John I. Haas, Inc., that you refer to?

A. That is one of several letters or telegrams instructing me to reject the Wellman cluster hops. This one is dated October 18th. There were others.

Q. How did you notify Mr. Noakes of these instructions to reject the Wellman clusters?

A. I notified him by telephone.

Q. Did you give him such instructions more than once?

A. Yes. I gave them to him a number of times because at the time we received instructions from John I. Haas, Inc., to accept the clusters and fuggle hops—to accept the fuggle hops and to reject Mr. Wellman's cluster hops, I telephoned immediately to Mr. Noakes, relaying those instructions to him, and he informed me Mr. Wellman was away.

Therefore, there was a lapse there of, I should say, [157] at least ten days between the time that we received the instructions to reject and the time

(Testimony of Harold W. Ray.)

that Mr. Wellman returned, so that we could get in touch with him to inform him, and during that period I talked with Mr. Noakes almost every day about the matter, asking if Mr. Wellman had returned and if he had accepted the fuggle hops and rejected the cluster hops. I suppose I talked to him six or eight times, between the time I first gave him the instructions and the time it was actually done.

Q. How were those conversations held?

A. They were all telephone conversations. Some were from my office and some from my home.

Q. Were the conversations referred to as having been from your office during office hours?

A. Yes.

Q. Did you say to Mr. Noakes why the cluster hops had been rejected?

A. Yes. I told him John I. Haas, Inc., reported to me that the quality of the hops was so poor that they could not get any of their customers to accept them.

Q. Did you tell him that was the reason for the rejection?

A. Yes. I told him that is what John I. Haas, Inc., complained of as the reason they could not accept them, because I asked him to tell Mr. Wellman.

Q. What instructions did you give to Mr. Noakes at that time relative to the fuggle hops? [158]

A. I told him that John I. Haas, Inc., would accept the fuggle hops on the contract at the price that

(Testimony of Harold W. Ray.)

had been agreed upon as the market price for the fuggle hops, which was 90 cents a pound at that time.

Q. Did you give Mr. Noakes any instructions concerning paying for the fuggles?

A. Yes, I did. I told him to pay for the fuggles and to deduct all the advances from the proceeds, the advances on both fuggles and clusters, both contracts.

Q. There will be handed to you Exhibit 3-V. Will you state whether or not you dictated that letter?

A. Yes, I did.

Q. To whom?

A. Oh, wait a minute. Addressed to whom?

Q. No; to whom did you dictate it?

A. To Miss Matheson.

Q. Do you know if the original was typed by Miss Matheson? A. Yes.

Q. Will you read to the Court that portion of the letter relating to the delay in contacting Mr. Wellman?

A. Yes. It is dated October 22nd and addressed to John I. Haas, Inc., Attention Mr. Walter Rauber.

“Referring to the Wellman contract, Mr. Wellman is still away and is expected to return this Friday night, October 24th, and we will contact him the following day if [159] possible and make settlement by taking over the fuggles and rejecting the clusters.”

Q. What was the source of that information that

(Testimony of Harold W. Ray.)

Mr. Wellman was away, as reported by you in that letter?

A. A conversation with Mr. Noakes.

Q. What had Mr. Noakes reported to you in that regard?

A. He reported to me Mr. Wellman was away, and he had been instructed to accept the fuggles and reject the cluster hops, and he reported to me that Mr. Wellman was away and he was unable to do so until he returned, and that he expected him to return Friday night, the 24th of October.

He did not tell me that in the first place. He did not know when he was going to return, but just prior to this, prior to October 22nd, he told me he thought he would be returning on the 24th.

Q. When did Mr. Noakes report to you concerning his rejection of the clusters?

A. He reported to me the night of, I believe it was, October 28th.

Q. What did he report to you at that time?

A. He reported to me that he had accepted Mr. Wellman's fuggle hops and he had rejected his cluster hops, I think, the day before, and in payment he had deducted all the advances on both the fuggles and clusters and given Mr. Wellman a check for the balance due him. [160]

Q. Do you recall how that report was made? Was it made in writing or over the telephone or in some other manner?

A. Over the telephone.

(Testimony of Harold W. Ray.)

Q. Was it made to you at your office?

A. There is practically no written correspondence between the Salem office and myself. Occasionally we did record some matters.

Q. There will be handed you Exhibit 3-Q. Will you examine that exhibit and inform the Court what it is?

A. Yes. It is a letter dated October 7th, which I dictated, and we wrote John I. Haas, Inc., Attention Mr. Walter Rauber:

“We refer to your letter of October 3rd, the third paragraph of which requests us to send you a list of your contract growers——”

Q. State what the information is that you have set forth in that letter.

A. The information lists several of our contract growers who had not been dealt with as of the date of October 7th.

Q. What do you mean, “had not been dealt with”?

A. Whose hops had not been inspected or weighed as of the date of October 7th. I can't say for certain whether there were any accepted before or not, but it gives a list of the growers, the contract growers and the date upon which they notified us of the price and the date that they had chosen for the market price of the contract. [161]

Q. Are Mr. Wellman's cluster hops listed in that letter?

A. Yes, his fuggles and clusters both are listed

(Testimony of Harold W. Ray.)

here, showing that on the fuggle hops he had selected a price of 90 cents and on the cluster hops he had selected a price of 85 cents, which was the going price of prime-quality fuggle and prime-quality cluster hops, as of that date. That was September 25th.

Q. Will you read the portion of the letter that explains the meaning of the listing of the growers' names?

A. "We list below the growers in the order in which the contracts were written. We are not including in this list lots that have been taken over."

We had taken over some of the contract hops prior to this letter, October 3rd.

Q. Was the purpose of that letter to report to John I. Haas, Inc., generally as to the hops referred to in that letter?

A. That was one of the purposes, but the chief purpose, Mr. Kerr, was to tell them the dates and the prices that the contract growers had selected as the market price in connection with their contracts.

Q. Did you talk with Mr. Wellman after Mr. Noakes reported that he had rejected the Wellman cluster hops?

A. Yes, I did, sometime subsequent to that. I think slightly over a month afterwards I talked to Mr. Wellman for the first time.

Q. Do you recall the date that you first talked to Mr. Wellman [162] after the rejection of the cluster hops?

(Testimony of Harold W. Ray.)

A. I can't recall the exact date. I think it was the first few days in December, but I couldn't say which date.

Q. Where did you hold that talk?

A. In my office, in Hillsboro.

Q. Was that during office hours? A. Yes.

Q. Was anyone with Mr. Wellman when he came to your office? A. No, there wasn't.

Q. What was the conversation with Mr. Wellman, if you remember?

A. Well, a great deal of the conversation was just visiting, just immaterial, but I think he called upon me particularly to ask me if I thought there was any likelihood of John I. Haas, Inc., finding a market for his hops.

Q. Which hops?

A. His cluster hops, and Mr. Wellman naturally was anxious and desirous of disposing of them, and he inquired of me if I thought there was any likelihood that John I. Haas, Inc., would be able to find a market for them, and I told him that we would try to do so—that they tried to do so but they had not been successful as yet, and that it was very difficult to do.

I also told Mr. Wellman that A. J. Ray & Son would attempt to find a buyer for the hops, and I told him I would use every effort myself to find a buyer for his hops.

He also asked me in that visit if I thought there was [163] any chance that John I. Haas, Inc., would

(Testimony of Harold W. Ray.)

make some sort of a cash settlement with him, whereby they would stand some of the loss. I told him I didn't think there was a chance that they would, and he inquired of me—he had a contract also with S. S. Steiner & Co. for the other half of his crop, and he inquired of me that if Steiner should make a settlement with him did I think that John I. Haas, Inc., would then do so, and I then told him I didn't think that they would, but it might possibly influence them.

Q. Did Mr. Wellman at that time make any reference to Mr. Noakes?

A. Yes, he did. He explained to me the details of his contract with S. S. Steiner & Co., and he appeared to be of the opinion that they had handled some of the details in connection with their contract differently than Mr. Noakes had, and he said Mr. Noakes had been strictly aboveboard and had not allowed him to believe anything that was not the case, that he at no time had led him to believe that the hops would be acceptable, that the cluster hops would be acceptable under the contract, even prior to the time that he harvested the yard.

Q. Do you recall Mr. Wellman at that time specifically stating that at no time Mr. Noakes had allowed him to believe that the cluster hops would be acceptable under the contract?

A. Yes, I do, certainly.

Q. And this was the contract with John I. Haas, Inc.? [164]

A. Yes.

(Testimony of Harold W. Ray.)

Q. At that time did Mr. Wellman make any demand upon you for any money? A. No.

Q. Did he at that time ask for payment for his cluster hops?

A. Why, no; of course, he didn't. His cluster hops had been rejected, and we had settled with Mr. Wellman.

Q. What do you mean you had "settled with Mr. Wellman"?

A. We had paid him for the fuggle hops and had deducted the advances that had been made on the cluster hops and the cluster hops had been rejected.

Q. Did Mr. Wellman, during that conversation, ask you why he had not received any more money?

A. No.

Q. Did you have any subsequent conversation with Mr. Wellman relative to his cluster hops, in 1947?

A. I had several subsequent conversations with Mr. Wellman. Mr. Wellman and Mr. Kever together called upon me several times subsequent to the first visit by Mr. Wellman.

The matter discussed was practically identical with what we discussed at the first meeting. Each time Mr. Wellman inquired of me if John I. Haas, Inc., had reported any progress in finding a market for his hops, and I had to inform him each time that they had been unable to do so.

I told Mr. Wellman in the first conversation, when he [165] first called, that I felt that dealers had a

(Testimony of Harold W. Ray.)

moral obligation to try to find a home for these hops that had been rejected; although it was not a legal obligation, I felt that we had owed him a moral obligation, and John I. Haas, Inc., admitted it to me—they said they felt the same way about it, and they were doing everything they possibly could to find a buyer for Mr. Wellman's cluster hops.

Q. Will you explain that reference to a moral obligation. What do you mean by a moral obligation?

A. I mean that Mr. Wellman had been a customer of John I. Haas, Inc., and A. J. Ray & Son for quite a long period of time, off and on—not every year but many years, and that in a year when a disaster occurred, such as 1947, in the hop business, whereby it became necessary for dealers to reject some of the hops, I felt that a dealer had a moral obligation to do everything in his power to find a market for those rejected hops, in order to assist the grower as much as he possibly could, and I told John I. Haas, Inc., exactly the same thing, and they agreed.

Q. Were warehouse receipts applicable to or covering the 1947 Wellman cluster hops ever offered or tendered to you by Mr. Wellman? A. No.

Q. Or by anyone else? A. No. [166]

Q. Have you ever seen those warehouse receipts?

A. For the late cluster hops, no.

Q. Were any loading checks covering these hops ever tendered to you or offered by Mr. Wellman?

(Testimony of Harold W. Ray.)

A. No.

Q. Or by anyone else? A. No.

Q. Did Ray & Son pay any warehouse charges on the Wellman late cluster hops, 1947?

A. Not to my knowledge. That is a question I probably would not know about, Mr. Kerr. That is a detail that would be handled in the office or by Mr. Noakes in the Salem office, and not to my knowledge; but I could not say that they did not do it. I wouldn't say that.

Q. Do you know whether or not John I. Haas, Inc., ever paid any warehouse charges on the late clusters?

A. I am certain that they did not.

Q. Did A. J. Ray & Son, to your knowledge, ever take out any insurance on those late cluster hops of Mr. Wellman's?

A. No, not on the late cluster hops. We did take insurance coverage on the clusters—on the fuggles, I mean to say. After they had been accepted and paid for, we then insured them.

Q. Do you know how the records in your office are maintained or reported or recorded with respect to insurance coverage on hops that you have taken over or accepted? [167]

A. Yes, approximately. We have a blanket insurance policy which provides—it is provided by our insurance brokers. Hops are insured in the name of John I. Haas, Inc., and it is a 30-day reporting system of insurance, whereby my office enters any

(Testimony of Harold W. Ray.)

hops that are insured from day to day, and once a month they make a report of the additions and cancellations during that 30-day period, and I think the premiums are based upon the daily balance of insurance in force.

Q. Were the Wellman cluster hops ever reported to the insurer you have mentioned as being covered by this blanket policy? A. No, they were not.

Q. Why not?

A. Because we never took the Wellman hops. We rejected them.

Q. Who in your office has charge of these records relating to insurance coverage?

A. Mrs. Townsend has charge of that, but she may have the assistance of Miss Matheson in operating it.

Q. You have examined, have you not, samples of the Killian Smith hops and samples of the Geschwill hops in connection with the trial of the two previous cases in this court? A. Yes, I did.

Q. Will you state to the Court your comparison of the samples of the Wellman late cluster hops that you have seen and the samples of the Killian Smith and Geschwill hops that you have seen; that is, the cluster hops. [168]

A. The Wellman cluster hops are not similar to either the Geschwill or the Killian Smith hops.

Q. In what way do they differ?

A. Mr. Geschwill's hops are a seedless type of hop, are a small-burred seedless hop, while the Kil-

(Testimony of Harold W. Ray.)

lian Smith hops were a decidedly yellowish hop and the Wellman hops were a large, green, flaky hop.

The mildew damage to the Wellman cluster hops and the Geschwill cluster hops was quite similar. In fact, both contained a large number or a very large number of what we termed nubbins in the testimony.

In addition, Mr. Wellman's cluster hops contained a good many partially matured burrs that had been damaged by mildew so that they were misshapen.

Q. Is there any difference in the amount of extraneous matter apparent in these samples of the three?

A. Yes. Mr. Wellman's hops were much dirtier picked than the other two that you refer to.

Q. Did A. J. Ray & Son purchase any prime-quality hops after October 28, 1947, on the spot market?

A. Yes, they did.

Q. Are those 1947 Oregon cluster hops?

A. Yes.

Q. At what price?

A. At 84 to 86 cents a pound, depending upon the leaf-and-stem [169] content.

Q. Were those the prevailing market prices?

A. That was on a basis of 85 cents, which was the prevailing market price, during the month of November at least.

Q. For whom were those purchases made?

A. For John I. Haas, Inc.

Q. Were those spot purchases?

A. Yes.

Q. After October 28, 1947, did A. J. Ray & Son

(Testimony of Harold W. Ray.)

purchase any 1947 Oregon cluster hops of a quality, grade or condition similar to those of the Wellman late cluster hops?

A. No, they did not, not subsequent to that date nor prior to that date.

Q. In your judgment, what was the effect of the continuing high prices for hops through September and October?

A. In my judgment, and I think it is perfectly obvious, it would result in a very sharp increase in prices.

Q. I think you misunderstood the question.

A. Possibly.

Q. Did those high prices prevailing in September and October have any effect upon harvested quantity?

A. Oh, yes. Of course, the higher the prices—higher prices influence growers to harvest all or practically all of their hops, instead of leaving any unharvested on the vines.

Q. Do you know of any instance where growers did leave hops [170] unharvested?

A. Yes, they did, that is true; but sometime earlier in the season, before the height of this mildew scare, it was estimated by a great many in the trade that the Oregon State crop would be very short, down as low as 50,000 bales possibly, and that caused a very sharp increase in price.

Then, as prices increased many growers who had practically determined or made up their minds that

(Testimony of Harold W. Ray.)

they would not harvest any hops decided to harvest hops.

The Court: Is there anything in this case as to the range of prices between the years of OPA and 1947? Is there anything in this case on that?

Mr. Kerr: The OPA regulations, sir?

The Court: No. OPA went off when?

Mr. Kerr: I am not sure, your Honor, but I think it was 1945.

The Court: What hops were worth in 1945 and 1946, is that in the case?

Mr. Kester: I don't think so.

The Court: Put it in.

Q. (By Mr. Kerr): Are you informed as to the market price for prime-quality hops, Oregon production, in 1945? What was the market at that time?

A. May I refer to some records?

The Court: You can get them later. [171]

A. I can't answer it, your Honor, immediately. I can't remember for certain just when OPA terminated.

The Court: Well, terminated in the election of 1946.

A. On hops?

The Court: OPA died then.

A. Yes, I know, but I think the ceiling price on hops terminated prior to that, if I am not mistaken. Maybe not.

Q. (By Mr. Kerr): I believe you testified that you are paid a commission by John I. Haas, Inc.,

(Testimony of Harold W. Ray.)

on hops that you purchase for that company, is that right?

A. Yes, either spot purchases or contract. The commission is the same in both cases.

Q. Your commission is not payable, I believe you stated, when hops are not accepted by the buyer?

A. Unfortunately, it is not.

Q. You have testified concerning the services which your men,—that is, the employees of A. J. Ray & Son,—performed for John I. Haas, Inc., relative to hops under contract to John I. Haas, Inc., and others, concerning advances which were made.

A. Yes.

Q. Advances made to Mr. Wellman for picking costs and otherwise, are those advances provided from your own funds directly?

A. From A. J. Ray & Son funds?

Q. From A. J. Ray & Son funds.

A. Yes. [172]

Q. Then I believe you testified your men sampled and inspected and weighed the Wellman cluster hops. Do you receive any compensation or reimbursement at all from John I. Haas, Inc., for these services performed by A. J. Ray & Son with respect to the Wellman cluster hops which were rejected?

A. No, according to the general practice of the trade we do not.

Q. Do you receive any compensation at all from John I. Haas, Inc., with respect to hops which are rejected by that company?

(Testimony of Harold W. Ray.)

A. No, we do not.

The Court: When you advance money, you draw right away on your principal?

A. Yes, we advance the money for what we call servicing the contract——

The Court: I am not interested in that. When you advance money, you draw right away on the customer? A. Very quickly at least.

Q. (By Mr. Kerr): You do not charge any interest on the advances, do you? A. No.

Q. Did you at any time have any authority from John I. Haas, Inc., to waive any provisions of the written cluster contract with Mr. Wellman?

A. No.

Q. Did you have any authority from John I. Haas, Inc., to agree [173] with Mr. Wellman that his selection of the price, the market price under the cluster hop contract would not be in writing?

A. No.

Q. Did you at any time have any authority from John I. Haas, Inc., to accept any of the Wellman late clusters on the 1947 crops of hops?

A. No.

Q. Did you at any time have any authority from John I. Haas, Inc.; that is, did A. J. Ray & Son have any such authority, to change any provisions of the cluster contract with Mr. Wellman?

A. No.

Q. Did you personally have any such authority?

A. No. We had authority to confirm the selected

(Testimony of Harold W. Ray.)

price, if you call that an amendment or a change. That was not in the contract when it was written.

Q. Do you have the figures with you relative to the quantity of 1947 Oregon hops rejected by A. J. Ray & Son for 1947? A. Yes, I have.

Q. Will you give those to the Court, please?

Mr. Kester: May it please the Court, Counsel has previously refused to permit us to examine any records or to ask any questions with respect to what the transactions were between either Ray or any of the other companies,—Paulus, for instance,—and the growers, other growers. As I understand it, a lot of that has come out in the case, although we were not allowed to go [174] into the records or to ask questions concerning those matters. If the case is going over, I wonder if we might not, in the interim, have access to that information?

Mr. Kerr: I will withdraw the question if it raises any question with respect to contract relations between this company and other growers. I will withdraw the question.

Q. Do you know of any Oregon grower whose entire hop crop was left unharvested in 1947?

A. I do not personally know of any that was left entirely unharvested.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Mr. Ray, you are the President of A. J. Ray & Son? A. Yes.

(Testimony of Harold W. Ray.)

Q. Does that corporation do all the buying of hops in Oregon for John I. Haas, Inc.?

A. It is my understanding that we do, yes.

Q. Do you personally represent John I. Haas, Inc., in any other respect?

A. I do, yes; not with respect to buying or contracting on hops, but John I. Haas, Inc., owns three farms in the State of Oregon, and they are registered as a corporation to do business in the State of Oregon, and I believe the statutes require that [175] they have a local representative, and I was appointed their attorney-in-fact in Oregon with respect to their operation of these farms, but I do not act in an individual capacity in buying or selling hops.

Q. Do you run these farms for them?

A. Supervise them, yes.

Q. You spoke about correspondence between your Hillsboro office and your Salem office in connection with the farm business, I suppose it was?

A. Yes.

Q. Is that what you referred to in that connection? A. Yes, that is what I refer to.

Q. How long has your corporation represented John I. Haas, Inc., in buying hops in Oregon?

A. I can't tell you exactly without looking at the records, but approximately since 1917 or 1918.

Q. John I. Haas, Inc., has that been your sole account in the past few years?

A. In the past few years it has; prior to that time it was not.

(Testimony of Harold W. Ray.)

Q. Do you negotiate hop contracts for John I. Haas, Inc.? A. Yes, we do.

Q. Do you make spot purchases of hops for John I. Haas, Inc.? A. Yes.

Q. And did in 1947? A. Yes. [176]

Q. Are you in charge of shipping the hops which John I. Haas, Inc., buys in Oregon?

A. When you say "you" in all of these questions you mean A. J. Ray & Son?

Q. Yes. A. Yes.

Q. As I understand it, is it correct that you make advances under those contracts for John I. Haas, Inc.? A. We do, yes.

Q. And then you immediately draw on John I. Haas, Inc., for such advances? A. Correct.

Q. Do you examine yards which are under contract with the Haas corporation?

A. Generally not personally. A. J. Ray & Son does.

Q. Mr. Noakes or Mr. Davis, is that right?

A. Yes, or Mr. Troxel.

Q. Mr. Noakes, Mr. Davis or Mr. Troxel?

A. Yes.

Q. Do you obtain and record chattel mortgages or hop contracts for Haas?

A. Will you repeat that?

Q. Do you obtain and record chattel mortgages on hop crops which are under contract with Haas?

A. Yes. [177]

Q. Do you inspect and sample hops for John I. Haas, Inc.? A. Yes.

(Testimony of Harold W. Ray.)

Q. Under the open-end contracts do you have authority to confirm the selected price?

A. That authority is subject to the approval of John I. Haas, Inc., but if we inform them that the price selected is, in our opinion, the Oregon growers' market price for prime-quality hops, they usually give us authority then to do so.

Q. Was John I. Haas President of the Haas corporation in Oregon in 1947? A. Yes, he was.

Q. Was that in August, 1947? A. Yes.

Q. Did he at that time know that there was mildew in the Willamette Valley?

A. Yes, he did, as I recall it, but when he was here early in August he did not fully—we did not realize the extent of the seriousness of the attack, but I am not positive—he was here, as I recall it, early in the month of August.

Q. Did he instruct you at that time not to pick any mildewed yards?

A. No, I didn't hear any.

Q. Did he instruct you at that time not to make any picking advances on yards which had been hit with downy mildew?

A. No, he did not. We discussed the matter whether or not to [178] decline to make any advances and it was Mr. Haas' opinion that it would be very dangerous, a very dangerous matter, for the buyer to refuse to make advances because, prior to harvesting, it was impossible to tell for certain what kind of a hop might be produced, and if it should

(Testimony of Harold W. Ray.)

turn out that the hops harvested were of prime quality and we had refused to make advances he would have been defaulting under the contract and he felt he would be subject to damages, so it was decided if a grower requested advances it was better to make them. He did authorize, however, that there could be some adjustment of the advances, depending upon what our field men estimated the yield would probably be.

Q. Do I understand that in making these advances the field men take the checks out to the yards? Is that the normal practice?

A. I think that is the usual practice. I am not positive, Mr. Dougherty, because they may have various methods. Many growers may call at the office in Salem, but I think they usually take them out, or at least frequently do.

Q. When Mr. Haas was here in Oregon in August, 1947, did he at that time instruct you not to sample, inspect, number and weigh in hops unless you had an agreement with the grower that that would not constitute an acceptance?

A. Not when Mr. Haas was here; no, sir.

Q. Did you inspect the Wellman 1947 fuggles and clusters in his yard? [179]

A. I did not.

Q. In the warehouse? A. No.

Q. Did you inspect the type and tenth-bale samples of his 1947 fuggles and clusters?

A. I did, yes.

(Testimony of Harold W. Ray.)

Q. In connection with that inspection, would you say that they contained some mildew?

A. Yes. I know they contained a considerable amount of mildew.

Q. Would you describe the 1947 clusters as large, flaky hops of a greenish color? A. Yes.

Q. Would you say that they were well filled with lupulin?

A. That was my opinion, and I so wrote John I. Haas, Inc.

Q. Would you say that they had quite a good flavor?

A. That also was my opinion and I advised Mr. Haas accordingly.

Q. Mr. Ray, what would you say was the market price in September, 1947, for good, average quality 1947 fuggles?

A. I think that the market price in September for prime-quality Oregon fuggles and also what you call good quality—and when I say “good quality” or “average quality” I do not mean average for the state, but I mean a good, average, prime-quality hop. The market was 90 cents a pound.

There was a considerable difference of opinion as to whether or not the 90 cents for fuggles included the sliding-scale [180] provision for picking. I think in our dealings we considered that the market was 90 cents flat for prime-quality fuggle hops. I don't think that we allowed a premium or discount on the

(Testimony of Harold W. Ray.)

fuggle contracts. That is my recollection, which is not important.

Q. Do I understand when you say “a prime-quality hop” you mean a good hop?

A. Naturally, a prime-quality hop—If you will read the description in the contracts, you will have to agree that a prime-quality hop must be a good hop.

Q. Do I understand it that when you say “prime-quality hop” you mean an average hop?

A. No, I don’t mean that, Mr. Dougherty.

Q. What was the market price in September for a good, average-quality 1947 cluster hop?

A. The market price for prime-quality clusters early in September, and I think——

The Court: Answer the question the way he asks it. If you can’t answer it, say so. He asked you for the market price for a good, average quality. If you don’t know what that means, say so, and don’t answer as to something else than what he asks.

A. Will you ask me the question again?

(Question read.)

A. Well, I do not admit that a good, average quality is prime quality. Prime quality is good quality, but I do not mean to [181] say that it is average for the state.

The Court: Go ahead, Mr. Dougherty, and ask another question.

Q. (By Mr. Dougherty): Did the market price

(Testimony of Harold W. Ray.)

change during September or October with respect to clusters? A. In my opinion it did not.

Q. And the prevailing market price in October was still 85 cents? A. 85-cent base.

Q. For clusters? A. Yes.

Q. Was that the market price on or about October 31st? A. In my opinion it was.

Q. Was that the market price on or about November 15th? A. In my opinion it was.

Q. When did that price change?

A. That I can't state for certain, Mr. Dougherty, but sometime later, or considerably later than that, I think, but we did not buy any spot hops after about the 15th or 16th of November, because we were unable to find or buy good quality, and it is my recollection that the market, although very inactive, continued practically unchanged for some length of time after the 15th of November.

Q. The market after the 15th of November was quite inactive, is that correct?

A. It was, in Oregon. [182]

Q. Was it all right with John I. Haas, Inc., after that, for Mr. Wellman to sell his 1947 clusters in May, 1948, to Williams & Hart?

A. It was, and it was all right for Mr. Wellman to sell them at any time after we rejected the clusters. We so told him.

Q. When Mr. Shields called you the first part of May, 1948, and when Mr. Wellman and Mr. Kever talked to you, did you so advise them at that time?

(Testimony of Harold W. Ray.)

I mean to ask: Did you at that time tell them that it was acceptable to the Haas corporation if Mr. Wellman sold the clusters to Williams & Hart?

A. Yes.

Q. Was 31 cents a pound for Mr. Wellman's 1937 clusters a fair price in the first part of May, 1948?

A. I think it was a fair price for the quality of Mr. Wellman's hops. I think it was a fair going price for that quality.

Q. Mr. Ray, have you ever picked your own hop-yards by this so-called method of selective picking?

A. If you consider the hopyard in which I am a part owner, my answer is Yes.

Q. I am speaking of your hopyards in Oregon, Mr. Ray.

A. Yes. Yes, I have. I think that is contrary to what is stated in the deposition, however.

Q. With reference to the deposition, just to refresh your memory, reading from Page 30: [183]

“Q. Have you ever had your own yard picked that way in Oregon?

“A. No, sir; no, sir. I have attempted to do it to a certain extent.

“Q. Why weren't you successful?

“A. Well, it was just difficult to get pickers to do it, and it would be rather expensive.”

A. Yes.

Q. Is that your testimony at this time?

A. Yes. I am not disputing that, Mr. Dougherty. You put the question whether I had ever done it

(Testimony of Harold W. Ray.)

selectively, and I recall that I, a number of years ago, picked selectively when we had a very severe attack of what we call mold in the hops, and left portions of the yard intact and also portions of the vine intact, which certainly would be selective picking. I overlooked that when I made that answer in the deposition.

Q. That was some years ago, Mr. Ray?

A. Yes, that was a number of years ago.

Q. What would selective picking mean, as you understand it?

A. It would mean picking cone by cone.

Q. Would you say that such selective picking was feasible or practicable in Oregon in 1947?

A. No, I don't think it was practical. I do think it was practical and feasible to leave certain burrs on the vine where the infection might be worse, leave them unpicked, but I think [184] what you mean, when we speak of selectively picking, it means picking the hops, you might say, one by one selectively off the vines. I don't consider that was practical.

Q. With reference to Exhibit 3-Q, that is a carbon copy of your letter of October 7th?

A. Yes.

Q. Did you by that letter notify the Haas corporation that Mr. Wellman had agreed to a market price of 90 cents on his fuggles and 85 on his clusters?

A. Yes.

Q. Did you by that letter advise the Haas cor-

(Testimony of Harold W. Ray.)

poration that a number of growers had notified you of their growers' market price selections by telephone rather than by written communication?

A. Yes. I added a postscript to the letter which states: "A number of these market contract growers notified us by telephone prior to the date shown above."

Q. Did John I. Haas, Inc., take Mr. Wellman's 1947 fuggles at 90 cents a pound, at the 90-cent figure of which the Haas corporation was notified by your letter? A. The fuggles, yes.

Q. In prior years, under this same type of contract, had Mr. Wellman ever advised you in writing of his selection of the growers' market price?

A. Not that I recall, no. I think he did not. [185]

Q. Was it your impression that was always done orally? Is it still your impression that was always done orally?

A. Well, it was generally oral, principally, by A. J. Ray & Son.

Q. Did the Haas corporation, in response to this letter of October 7th, at any time object to such telephonic notifications?

A. I believe they did, yes. I believe that they instructed us that they wanted the notifications from the growers in writing, as was provided for in the contract, and we did induce quite a number of our growers to do that. We had to keep right after them to get them to do it.

My position was that I was anxious to get the

(Testimony of Harold W. Ray.)

growers to select these dates because I was fearful of a decline in price. It did not occur, but I was fearful of it, and I wanted them to get protected under these high prices and I wanted them to give us what you might call a formal notification of their selection.

Q. With reference to the letter of October 7th, Exhibit 3-Q, did the Haas corporation ever refuse to recognize any of the selected prices on the ground that the buyer was notified by telephone?

A. No.

Q. With reference to Exhibit 3-I, which is your telegram to John I. Haas, Inc., of September 24th—

A. —September 24th? [186]

Q. Yes, 1947. A. Yes.

Q. I believe that telegram says that you will attempt to do something. A. Yes.

Q. What does that word “attempt” mean? What do you mean by that?

A. It means just exactly what it says, Mr. Dougherty. They had instructed us to proceed upon that basis and I wired them confirmation that we would attempt to proceed on that basis. It is conceivable some grower might refuse to let us proceed on that basis, in which case all we could do would be to attempt to.

Q. With reference to Exhibit 5, which is a telegram from John I. Haas, Inc., does that telegram refer to the telegram that we have just talked about, Exhibit 3-I?

(Testimony of Harold W. Ray.)

A. Well, 3-I was a telegram from ourselves to John I. Haas, Inc., dated September 24th.

Your Exhibit No. 5 is a telegram from John I. Haas, Inc., to A. J. Ray & Son, dated September 25th, in which he states or suggests, rather, that we do that.

I don't know why he told us again. He had instructed us to do it and then he suggests that all contracts, including the 44- to 50-cent group be notified by letter that inspection, sampling and weighing does not constitute acceptance, and that the decision of this question by the home office will be communicated to the grower later so that no misunderstanding of such inspection can arise.

Those are their instructions to us, that we must have that in writing.

Q. As a matter of fact, was not the procedure outlined in your telegram of September 24th a suggestion to John I. Haas, Inc., and wasn't this telegram of September 25th from John I. Haas, Inc., their instructions to follow that procedure?

A. Yes, it was, Mr. Dougherty, but we had not specified in our telegram of September 24th that we have this understanding or agreement with the growers in writing, and then they answered us the following day and instructed us that we must have it in writing, and then we proceeded on the 25th of September—I drafted a letter, which was typed and sent to all contract growers, and I told them not to send it to Mr. Wellman because they were inspect-

(Testimony of Harold W. Ray.)

ing and weighing and sampling Mr. Wellman's hops that very day.

Q. Do I understand, then, that on September 25th, by this letter—this telegram marked Exhibit No. 5, that John I. Haas, Inc., concurred with your suggestion that the hops be weighed in under this arrangement?

A. No, Mr. Dougherty, I don't agree with you. My wire to them on the 24th referred to their telegram of the 24th which I assume instructed us to—that that was the way to proceed, to [188] have that understanding.

Q. Do you have Exhibit 3-G before you?

A. Yes. Wait a minute. Let's see now. I don't think I have.

(Exhibit 3-G handed to the witness.)

Q. Is Exhibit 3-G the Haas telegram you are referring to?

A. That apparently must be the reference—this telegram of September 24th from John I. Haas, Inc., must have been the telegram that I was wiring an answer to on the 24th.

It does not state anything about the manner of proceeding with this weighing and inspecting of hops. It apparently would seem that I, on September 24th, had suggested to them that this would be a method of getting the ball rolling, but I did not include in this telegram anything about having that agreement in writing.

They came back, then, on the 25th and suggested

(Testimony of Harold W. Ray.)

that they be notified by letter, that it be put in writing.

Q. I would like to get the sequence straight.

A. It is a little difficult for me, too.

Q. Do I understand that by Exhibit 3-G, the telegram of September 24th, John I. Haas, Inc., sent a telegram relating to their general policy, is that correct?

A. That must be so, yes. I have got that marked "Re: Policy Handling Contracts."

Q. Then, by Exhibit 3-I, the text of which is also shown in Exhibit 3-H of that same date, or September 24th, is it correct [189] to say that you suggested to the Haas corporation a particular procedure for handling this matter?

A. Yes, I think that is correct.

Q. Then, on the following day, or on September 25th, by the telegram marked Exhibit No. 5, is it correct to say that the Haas corporation approved the procedure suggested by you, with the additional feature that it should be done in writing?

A. Correct.

Q. Do I understand Mr. Wellman's clusters and fuggles were weighed in on the 25th?

A. Yes, that is the date.

Q. Did you start writing these letters to other growers on the 25th? A. Correct.

Q. You have previously testified you gave instructions to Mr. Noakes on this matter several days before the 25th, is that correct?

(Testimony of Harold W. Ray.)

A. It is. That is correct, yes.

Q. How could you have given those instructions to Mr. Noakes several days before the 25th when the policy was decided upon—when the policy was not decided upon, rather, until the 25th?

A. Because I wanted to proceed with caution, and I told Mr. Noakes that he must not, under any circumstances, inspect or weigh any contract hops without an understanding that it did not constitute an acceptance, because we had received no authority to accept any of those hops at that time; that authority had been taken completely out of our hands; and that the Washington office had to decide upon the quality.

Q. When was it that that authority, as you say, was taken completely out of your hands?

A. I can't state the exact date.

Q. Was that before——

A. Mr. Frederick J. Haas, the son of Mr. John I. Haas, and an officer of the company, was here in Oregon at that time, and he was at my office numerous days and he inspected many of these samples, and he told me that we must proceed with caution on these things and that we must not accept any of these hops until Washington had approved of it.

Q. What time was Mr. Frederick Haas here?

A. He was here on the Pacific Coast, between California, Washington and Oregon, from practically the beginning of the harvest until consider-

(Testimony of Harold W. Ray.)

ably after the harvest, in connection with their farming operations on the Coast.

Q. As a matter of fact, wasn't this authority taken out of your hands by that letter of September 24th? I beg your pardon. Wasn't that authority taken out of your hands by the telegram of September 24th which is marked Exhibit 3-G?

A. I didn't consider it so, Mr. Dougherty, and I still don't.

Q. You did not consider Exhibit 3-G as taking any authority out of your hands, is that correct?

A. No. I can't so construe it.

Q. In prior years had you not inspected samples and weighed in hops under contracts with Haas on your own judgment?

A. No. That is not true, Mr. Dougherty. No.

Q. Had you ever before had such an arrangement with Mr. Wellman under this same series of contracts with Haas corporation?

A. No, I think not. If I might state, however, the general practice had been that the buyer would reach his decision upon the basis of type samples submitted to him and then would give us our instructions whether or not to accept. If they told us to accept, it would be on the basis that the hops would actually run equal to the type samples.

Q. In prior years do I understand that you had, at the time of inspection at the warehouse, determined whether or not the crop as a whole would be accepted?

(Testimony of Harold W. Ray.)

A. That was the usual case, yes.

Q. Do I understand that in 1947 the Haas corporation dealt only in prime-quality contracts, so-called prime-quality contracts?

A. They were the only kind of contracts they had.

Q. Do I understand that it is your opinion, Mr. Ray, that a hop to be cleanly picked, under the so-called prime-quality contracts, must have not more than 6 per cent extraneous matter?

A. That is my personal opinion, yes.

Q. Did the Haas corporation take any hops under prime-quality contracts in 1947 which had more than 6 per cent? [192]

A. They did not take them under prime-quality contracts, Mr. Dougherty, but they bought, in a number of cases—in a number of cases waived the quality specifications in the contract and accepted hops that were dirtier picked.

Q. With reference to Exhibit 3-W, the second page, the second paragraph, and with particular reference to Sample No. 42, did that sample show a 9 per cent pick? Is that your handwriting on the side?

A. Yes. Yes, that is my handwriting, and that is apparently what the hops analyzed, was 9 per cent.

Q. Were you authorized by the Haas corporation to take that 9 per cent picked crop under the contract?

(Testimony of Harold W. Ray.)

A. It says: "Newton: Sample No. 42. We have authorized you to take these 38 bales at the contract price. They are slightly tinted but otherwise the quality is fairly good."

Q. Does that mean they were slightly tinted with mildew?

A. No, that don't. They were slightly tinted with ripeness.

Q. With reference to Page 2, the eighth paragraph of that exhibit, Mr. Ray—— A. Yes.

Q. ——were you authorized by the Haas corporation in 1947 to take the 60 bales of clusters on Sample 88 on the 50-cent contract, even though they showed a 10 per cent pick?

A. That I don't know, what they showed, but they authorized us to accept those hops at 50 cents.

Q. They authorized you to accept the hops, regardless of the pick, is that correct?

A. It says, "We have authorized you to take the 60 bales on the 50-cent contract. This is another case where we do not have the picking analysis but the hops seem to be quite good and therefore we will take them."

Q. Was a 50-cent contract a high- or low-priced contract for 1947?

A. For 1947, the fall of 1947, it was a low price.

Q. Did you actually take those hops at 50 cents?

A. I presume that we did.

Q. What is that notation on the side there, "10 per cent equals 47 cents"? What does that mean?

(Testimony of Harold W. Ray.)

A. That would mean, in my opinion, that on account of the 10 per cent picking that there should be a discount of 3 cents a pound. That would have made them 47 cents. Without reference to the previous record, I cannot tell whether we took them at 50 or 47.

Q. With reference to Page 1 of that letter, the last paragraph (Exhibit 3-W), did the Haas corporation authorize you to deliver late clusters under a contract even though those clusters showed 10 per cent picking? A. Correct.

Q. Those were all prime-quality contracts, were they?

A. The hops were covered by prime-quality contracts, but the [194] Seeres crop price, market price, the determination was made quite early in the season at 65 cents. In other words, 20 cents below the price after the hops had been harvested, and the Serres hops had a very light amount of mildew damage and, therefore, they waived the bad picking for the reason that the hops were fairly free of mildew.

Q. Did the Serres 65-cent contract contain a picking clause?

A. I can't answer that question, Mr. Dougherty. I don't have the record here.

Q. To refresh your memory, I wonder if you would look at Exhibit 3-Q, which is a carbon copy of your price notification letter to Haas, dated October 7, 1947. Does that answer the question?

A. I don't think it does.

(Testimony of Harold W. Ray.)

Q. Does that indicate whether or not that Serres 65-cent contract had a picking clause in it?

A. Oh, yes. It says No.

Q. "No picking clause"?

A. No picking clause; just cleanly picked hops.

Q. You took that 10 per cent pick under that contract, referring to Page 1 of Exhibit 3-W, at the bottom of that page?

A. Yes. Yes, I know that we took them; yes.

Q. Did you take off 2 cents because of the 2 per cent over 8 per cent pick?

A. That is a question I can't answer. I can't remember.

Q. Were you authorized by the Haas corporation to take them [195] at 63 cents, because of the 10 per cent pick? A. Yes.

Q. With reference to Exhibit 3-W, will you look at the top of Page 3? A. Yes.

Q. Did you take, under a prime-quality contract, hops which showed 12 per cent pick, and which were tinted by mildew?

A. Who are you referring to there?

Q. Pahl, Sample 59.

A. No, we didn't, Mr. Dougherty. Those hops were rejected. This letter apparently was an authorization to take them but, before those hops were accepted, they changed their instructions and those hops were not accepted. They were rejected outright on the contract.

Q. But they at first authorized you to take them?

(Testimony of Harold W. Ray.)

A. They said in this letter, "Sample No. 59: These 47 bales appear to be fairly good from the one sample which we have here, although they are somewhat tinted and are of only medium quality. We have authorized you to take over this lot in order to protect our advances."

Well, we didn't take them over. We rejected them, and we have not recovered our advances.

Q. Those hops show the 12 per cent pick, is that correct?

A. Yes, that is the notation that I have written on the margin of that letter. [196]

Q. With reference to Page 2 of that letter, the fourth paragraph, relating to Foster, Sample 66, was that so-called prime-quality contract?

A. Yes, all contracts, Mr. Dougherty, were prime-quality contracts. They all specified prime-quality hops.

Q. In this particular instance, on a prime-quality contract, the Haas corporation authorized you to take over hops which showed 13 per cent pick?

A. Yes, they did, but there were extenuating circumstances. They did it for their self-protection.

Q. Were those hops tinted with mildew?

A. Practically none, but they were very dirty picked.

Q. Did the Haas corporation consider they were of good quality? A. No.

Q. As a matter of fact, didn't the Haas corpora-

(Testimony of Harold W. Ray.)

tion instruct you to apply the picking penalty in all cases, regardless of whether the contract contained the so-called picking clause or not?

A. I don't think they ever gave me those instructions, exactly, Mr. Dougherty.

Q. With reference to Page 2, Paragraph 7, of the letter, Exhibit 3-W, does that refresh your memory?

A. Yes. "We do not have a picking analysis on this lot," and "We are leaving it to you to apply penalties on the picking in this and other cases where it can be done." [197]

Q. What does the clause "where it can be done" mean?

A. Some of these growers with low-priced contracts, 40- or 50-cent contracts, but with a high cost of production, if their hops were not too terribly bad, in self-protection we had to practically take them to get our advances back; didn't have the nerve to ask them for a discount because of the dirty picking.

Q. On the higher-priced contracts was it your procedure to apply the so-called picking penalty?

A. Yes, that was the general practice of the higher contracts.

Q. Do I understand that in your opinion hops that would be in that class cannot be prime-quality hops? Is that correct?

A. Under a strict interpretation they could not be.

(Testimony of Harold W. Ray.)

The Court: Recess until 1:30.

(Thereupon a recess was taken until 1:30 o'clock P.M., of the same day.) [198]

1:30 o'clock P.M., February 1, 1949

Cross-Examination

(Continued)

By Mr. Dougherty:

Q. Mr. Ray, this morning you referred to a case you knew of concerning selective picking in a yard in which you had an interest. Is that yard located in the United States? A. No, it was not.

Q. Do I understand, Mr. Ray, that it is your opinion that a good hop is not necessarily a prime hop? Is that correct?

A. That is my opinion, yes.

Q. Do I understand that in your opinion a prime hop should be picked 6 per cent or cleaner, is that correct?

A. I stated that as my opinion, Mr. Dougherty, although I am frank to admit that in 1947, 8 per cent generally was conceded to be and was, in fact, the picking that was allowed for a prime-quality hop.

Q. In 1947 did John I. Haas, Inc., take any hops under so-called prime-quality contracts that were 13 per cent picked?

A. I believe they did, yes.

Q. Where did Mr. Wellman take his 1947 fuggles and clusters?

(Testimony of Harold W. Ray.)

A. You mean to what warehouse?

Q. Yes. [199]

A. To Schwab's warehouse in Mt. Angel.

Q. Was Schwab's warehouse in Mt. Angel an acceptable place to John I. Haas, Inc.?

A. Yes. I think the Mt. Angel warehouse was specified as the delivery place in the contract.

Q. Was the time that he delivered them there acceptable to John I. Haas, Inc.?

A. Why, yes.

Q. In your opinion, Mr. Ray, a lot of hops which contains some mildew, is that lot a prime-quality lot?

A. Strictly speaking, I would say it is not a prime-quality hop.

Q. In 1947, as a matter of practice did the John I. Haas corporation take in any clusters which showed some mildew, under prime-quality contracts?

A. You mean did they accept them on contract if they showed some mildew?

Q. Yes.

A. Yes. I think that they did, Mr. Dougherty, where the mildew infection was very slight and where the quality otherwise was good.

Q. With reference to Exhibit 3-W, which is that three-page letter——

A. That three-page letter, yes.

Q. On the first page, in the sixth paragraph——

A. Yes.

Q. ——did the Haas corporation in 1947, on Sample 64, accept a lot of hops under a so-called

(Testimony of Harold W. Ray.)

prime-quality contract which were rough, tinted and showed mildew damage?

A. May I refer to notes?

Q. Please do.

A. Yes, I think they accepted those hops, not as a prime hop, but they waived the quality specifications because of other circumstances, other than quality.

Q. Were those hops covered by a so-called prime-quality contract? A. They were, yes, but——

Q. The Haas corporation paid the contract price?

A. These hops were contracted at 45 cents a pound, which was an extremely low price as compared to the market at that time, and I assume they submitted samples of these hops to a brewery which had them purchased at a low price and they decided to waive the quality specification and accept them because the price was low.

Q. Is that an assumption on your part, Mr. Ray?

A. Well, I couldn't prove it.

The Court: I was interested in a remark you just made. Did they resell at that contract price?

A. They usually keep their sales practically in balance with their contract purchases and, therefore, hops that were purchased [201] at low prices were also sold to breweries at correspondingly low prices; that is, with a margin between.

Q. (By Mr. Dougherty): Do I understand that on the Mattison-Sloper contract, Sample No. 39,

(Testimony of Harold W. Ray.)

that they took 129 bales on the floor contract at 75 cents?

A. I will have to refer again to notes. I can't remember all of those things.

Yes, that contract was divided. In other words, there were 159 bales involved, made up of 129 bales on one contract, the first contract, and 30 bales on a second contract.

The first contract was an open-end contract and the second contract was at a fixed price of 45.

On the first contract, 129 bales were rejected and re-purchased on the basis of 75 cents for 8 per cent picked hops, and these hops were 9 per cent, and we paid 74 cents.

Q. This language in the letter of October 30th, Exhibit 3-W: "We have authorized you to take over the . . . 129 bales on the floor contract at 75 cents." What does that authorization mean?

A. Well, it means that the contract to which the 129 bales applied was what we term an open-end contract, which John I. Haas referred to as a floor contract. They were not floor contracts. They did have a minimum prime, provided for the minimum or the market, whichever was the higher, and of course they were all at market. [202]

Q. Is it correct to say, Mr. Ray, you were authorized to take over this particular lot of mildewed hops on that prime-quality contract?

A. No, sir. No, sir; that is not the case. We were authorized—what we did was that we rejected

(Testimony of Harold W. Ray.)

those hops, these 129 bales, on the contract, and repurchased them from the grower at 10 cents a pound lower. Then there was a one-cent discount for picking.

Q. Isn't it a fact that you were exercising a contractor's privilege when you did that, taking them at a lower price than specified in those contracts?

A. No, I would not consider it so. I don't think I understand just what you mean, Mr. Dougherty.

Q. Don't these contracts provide the buyer shall have the privilege of taking them at a lower price?

A. My interpretation was or is that he has the privilege of taking a portion of them at a lower price in order to recover his advances, but this transaction was not handled in that manner, as using that privilege specified in the contract.

I, in fact, told Mattison that we could not accept those hops on the contract because of the quality, and then I made the deal with him and repurchased them on the 75-cent-a-pound basis, which was reduced one cent on account of the picking.

Q. Other than the mildewed hops referred to in the letter of [203] October 30th, which is Exhibit 3-W, how many lots of mildewed hops did the Haas corporation take in, in 1947?

A. I don't think I can answer that, Mr. Dougherty, without additional notes. I didn't anticipate——

Q. Can you give us an approximation?

(Testimony of Harold W. Ray.)

A. Well, I can put it in this way: They accepted practically no hops that were seriously affected with mildew unless, in a few cases, the price was low, the contract price was low, around 45 to 50 cents a pound, or in some cases where it was necessary to try to get their advances back; if they were badly infected with mildew, they rejected them outright, even though their advances were jeopardized.

I can't state the quantity, but you can see from this letter that you have read that there were a number of lots of hops that showed some degree of mildew that they took over, where they waived their rights with respect to quality and took the hops over, but, for the most part, they did not accept hops that had any appreciable quantity of mildew. I will qualify that by saying, "on the contracts." There were a number where there was a small amount of mildew, where they rejected the hops and re-purchased them at a lower price.

Q. Mr. Ray, did you ever talk personally with Mr. Wellman in August, 1947?

A. No, I didn't talk personally with Mr. Wellman prior to, I think, the first few days in December of 1947, and I don't [204] believe I talked with him during the year of 1947, prior to that.

Q. Did you have any telephonic or written communication with him prior to December, 1947?

A. I don't recall any.

Q. When Mr. Frederick Haas was in Oregon for the harvest season of 1947, did you have any con-

(Testimony of Harold W. Ray.)

versation with him concerning Mr. Wellman's hops?

A. Yes. I don't know if I had a conversation with him, but he had some conversations with me.

Q. In order that there may be no misunderstanding, may I refer to the deposition——

A. Yes.

Q. Reading from Page 28:

“Q. Did you have any conversation with any of those officials of the Haas corporation when they were in Oregon in 1947 with reference to Mr. Wellman's 1947 drop?

“A. I don't believe we did.”

A. Yes. Well, I would qualify that answer now with respect to Mr. Frederick Haas particularly. This was with Mr. Haas—this was after the harvest and when he saw a type sample of Mr. Wellman's hops.

Q. That was one of the samples which one of your men had taken from Mr. Wellman's crop, was it? [205] A. Yes.

Q. That was before the inspection in the warehouse? A. Yes, that is correct.

Q. Did Mr. Frederick Haas ever inspect Mr. Wellman's crop in the warehouse? A. No.

Q. Did he ever inspect that crop in the yard?

A. Not to my knowledge. I don't think he did.

Q. To your knowledge, did Mr. Frederick Haas have any conversation with Mr. Wellman personally?

(Testimony of Harold W. Ray.)

A. Not to my knowledge. I am almost certain he did not.

Q. Did Mr. John I. Haas have any conversation with Mr. Wellman personally in 1947?

A. Not to my knowledge. I also am quite certain he did not.

Q. How about Mr. Walter Rauber?

A. No, Mr. Rauber was not on the Coast, to my knowledge, at that time.

Q. Did any official of the Haas corporation have any conversation with Mr. Wellman?

A. Not to my knowledge.

Q. By "conversations" I mean to include both written and telephonic, and personal.

A. Yes. Well, if they did, I didn't know that, and I am quite certain that they did not.

Q. To the best of your knowledge, were all of the dealings [206] between John I. Haas, Inc., and Mr. Wellman in 1947 conducted through your organization?

A. Yes.

Q. Was that the case also in prior years, under this same group of contracts?

A. Yes.

Q. Was the procedure, the transaction between your organization and Mr. Wellman with respect to these Haas contracts substantially the same in 1947 as it had been in prior years?

A. It was not.

Q. Do you now have reference to this alleged agreement concerning the weighing-in?

A. Yes. That is what I refer to.

(Testimony of Harold W. Ray.)

Q. Aside from that, were the transactions substantially the same?

A. I should judge so. I don't think of anything that was different except what you referred to, that we preferred inspection and tenth-bale samples and the weighing with the understanding that they would not constitute an acceptance, because we did not have authority to accept them.

Q. Do you have any personal knowledge concerning that matter, Mr. Ray?

A. I was not present, no. I have no knowledge except what was told to me.

Mr. Dougherty: Thank you, Mr. Ray. [207]

Redirect Examination

By Mr. Kerr:

Q. Counsel asked you this morning about market prices of good, average-quality hops. Do you have any means of knowing what the average quality of hops in Oregon was in 1947?

A. No, I couldn't fix the point of average quality in 1947 for cluster hops. It would be impossible for me to do it.

Q. You referred to the Wellman cluster hops as having been weighed in on September 25th. What do you mean by "weighed in"?

A. I did not mean weighed in. If I said it, I spoke ill advisedly. I meant that they were weighed.

Q. You are being handed Exhibit No. 7. Will you look at Exhibit No. 7 and state whether or not

(Testimony of Harold W. Ray.)

that is one of the telegrams that you referred to instructing you to proceed with caution?

A. Yes.

Q. Will you read the portion referring to the policy of proceeding with caution.

A. Yes. It says: "Frankly do not know what will be able to do about Oregon deliveries this season and must go slow."

Q. What is the date of that telegram?

A. September 22nd.

Q. That is a wire to you from John I. Haas, Inc.? Is that right? [208]

A. Yes.

Q. Reference was made to several of the growers' hops referred to in the letter of October 30th, which is Exhibit 3-W. Do you have that exhibit before you?

A. Yes, I do.

Q. Refer to Page 2, the seventh paragraph, relating to the Hayes contract. State whether or not the Hayes contract provided for a sliding-scale proposition; that is, premiums and discounts?

A. Yes, it did.

Q. Is that reference in the last sentence of that paragraph a reference to such a sliding-scale provision?

A. Yes. It says, "We are leaving it to you to apply penalties on the picking in this and other cases where it can be done."

Q. What was referred to by the words "where it can be done," if you know?

A. My opinion is that with respect to contracts

(Testimony of Harold W. Ray.)

that were considerably below the then going market price that they anticipated it would be rather difficult to arrange for discounts for picking with some of these growers, and they would protest very strongly, and, inasmuch as they had their hops sold so far below the market, we did not like to be too drastic in dealing with them.

Q. Under these sliding-scale price contracts did you also pay a premium as well as take a discount?

A. Yes. For picking that was less than 8 per cent, there was a [209] premium. In this particular case that you speak of, Hayes, there was a discount of one cent per pound for picking, or 9 per cent.

Q. Were other contracts referred to in the letter concerning which you were examined by Mr. Dougherty also contracts with sliding-scale price provisions?

A. All contracts had sliding-scale price provisions, in one manner or another. Some contracts were written before the sliding-scale price provisions were in vogue, before they were used, but the majority of these contracts were what we call open end or market-price contracts, and where it was established that the market was 85 cents, or a certain price, on the sliding scale, why, then, that sliding scale became applicable to the contract, even though it was not mentioned in the contract.

Q. You have referred to instances where John I. Haas, Inc., in 1947, did buy or accept hops that

(Testimony of Harold W. Ray.)

contained 10 per cent or greater leaf-and-stem content.

What were the circumstances, as a general rule, concerning the acceptance of such hops in 1947 by your firm?

A. A majority of those cases were hops at a contract price very materially below the then going market price, and there were other cases where dirty picked hops were accepted if the hops did not show any appreciable amount of mildew.

Naturally, hops without mildew were scarce in 1947 and the trade was anxious to get them and, in a very considerable [210] number of cases they waived the contract specifications with respect to picking, if they did not show any appreciable amount of mildew.

Q. Are you prepared to state what the prevailing market price for prime-quality hops in Oregon was in 1945?

A. In 1945, if you will permit me to refer to notes——

Q. Yes.

A. I am quite positive that in 1945 the OPA ceiling price was in effect. Yes, it was. The OPA ceiling price was 64 cents a pound for seeded cluster hops at a basis of 8 per cent picking. That was the ceiling price, and we applied that in practice—that was for a prime-quality hop—because there was no restriction with respect to paying a lower price than ceiling.

(Testimony of Harold W. Ray.)

Q. What was the prevailing market price for prime-quality cluster hops in Oregon in 1946?

A. In 1946, according to my records, I believe the OPA ceiling price—I think it had been vacated in 1946, but in the early part of 1946 the market for prime-quality hops was 64 cents a pound, which was the same as the ceiling price had been.

Q. Do you have the market price for 1944?

A. That was the ceiling price, 64 cents, for prime quality 8 per cent picking. OPA didn't say anything about price quality. That was 64 cents a pound for a seeded hop, that is all there was to it, of an 8 per cent pick.

Q. Did OPA establish differentials, premiums and discounts [211] above or below 8 per cent?

A. Yes, they did, and my recollection is that the scale was three-quarters of a cent a pound for each one per cent of picking, either above or below 8 per cent, premium or penalty.

Q. You refer to "taking over hops in 1947 to protect our advances." What do you mean by that term "protect our advances"?

A. Well, John I. Haas, Inc., through ourselves, had made advances on all of these contracts and, in quite a number of the contracts, the circumstances were such that for one reason or another they were doubtful of our ability to recover those advances unless we took over the hops.

Mr. Kerr: That is all; thank you.

The Court: Mr. Kerr, I would like for you to

(Testimony of Harold W. Ray.)

inquire whether an adjustment was made between his principal and himself as to all this money he had laid out on what you call servicing these contracts, such as the incurring of telegraphic expense, telephone expense and other overhead items. Was that a complete loss to him under the circumstances?

A. It was, yes.

Q. (By Mr. Kerr): The record shows that A. J. Ray & Son, during the course of the season, expended sums for telegrams, inspection of hops and hop seals, contacting growers, sampling lots of hops, and performing other services in connection with the contracts between those growers and John I. Haas, Inc.

When the hops covered by such a contract were rejected by John I. Haas, Inc., and not-repurchased, were you reimbursed [212] in any way by John I. Haas, Inc., for those expenses?

A. We were not, no. We received no commission and we were not reimbursed for our costs in servicing those contracts, and the cost to us in connection with rejected hops, as for example this case, is many times greater than it would be otherwise, but we receive no recompense for that at all.

Q. Where hops are not taken in by John I. Haas, Inc., are all of those expenses incurred by your firm a complete loss to you?

A. They are, yes. Therefore, we are not anxious to reject hops, I can assure you of that.

Mr. Kerr: That is all.

(Testimony of Harold W. Ray.)

Recross-Examination

By Mr. Dougherty:

Q. You said you had no way of knowing what the market price for 1947 for average-quality hops was. Is that correct?

A. I don't think it is entirely correct, Mr. Dougherty. I believe that he asked me if I could say what the average would be on an average-quality hop for the season. I stated I could not, I would not know how to figure out what the average quality for the year was. I don't believe I said "price." Possibly I am wrong.

Q. Do you know what the going market price on good, average-quality hops was in 1947, say, in September of that year? [213]

A. Yes, I know that, Mr. Dougherty. During September buyers were anxious to buy hops selling at 85 cents a pound, 85 cents a pound for prime-quality clusters, Oregon hops, and it was my opinion that 85 cents a pound was paid for cluster hops that were not fully prime in quality, and I would call those good hops.

Q. I believe you stated that all open-end contracts, in one way or another, incorporated the sliding-scale feature. Is that correct?

A. That is my opinion, Mr. Dougherty, because if they were open end they provided for the fixing of the price, depending upon the Oregon growers' market for prime-quality hops as of a certain date, selected by the grower. Now, if on the date se-

(Testimony of Harold W. Ray.)

lected by the grower, if the market on that date was, say, 85 cents for an 8 per cent hop, that was the market we would have to apply to that contract; that is, we would have to then apply the sliding-scale feature because that was the market price. That is what I refer to.

Q. In arriving at the amount of your commission from John I. Haas, Inc., was any consideration given to the matter of your general overhead?

A. No, there was not. I am not certain that I understand just what you wish to know.

Q. Under your bookkeeping system do you charge each telephone conversation, each telegram and so forth against any particular [214] contract?

A. Oh, no, we do not. We charge it probably to expense or those things and we do not recover—we do not pass that on to Haas afterwards.

Our services to Haas are paid for simply on a commission basis, so much for each pound of hops that we handle and deliver to them. If the hops are not delivered to them, if they are rejected and not received, we do not get anything back. We are out of pocket.

Q. In arriving at your arrangement with the Haas corporation, do you consider the amount of commissions which you do receive recompenses you for your general overhead?

A. Ordinarily I would say they do, yes, but in 1947 our business produced a very small margin of profit.

(Testimony of Harold W. Ray.)

Q. Under this arrangement with the Haas corporation are you expected to incur expenses for these items of overhead expense?

A. Why, certainly. That is a part of the service that we perform, but, naturally, where we perform this we are expecting to get paid in the way of a commission.

Q. Is it part of your arrangement with John I. Haas, Inc., that you shall, for example, maintain the Salem office?

A. Oh, he doesn't specify—he has never specified that we must maintain the Salem office.

Q. But he does expect you to have field men?

A. He expects us to give service in the handling of the business [215] and, if we feel it is necessary to maintain a field office in Salem to do that, we do it. That is what we have done.

Mr. Dougherty: Thank you.

(Witness excused.)

EMMA L. TOWNSEND

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, Mrs. Townsend.

A. Emma L. Townsend.

Q. Where do you live, Mrs. Townsend?

(Testimony of Emma L. Townsend.)

A. Hillsboro, Oregon.

Q. What is your occupation?

A. Secretary and Office Manager, A. J. Ray & Son, Inc.

Q. How long have you been employed in that position?

A. Twenty-nine years next month.

Q. During that period you have continuously been engaged with A. J. Ray & Son, is that right?

A. Yes.

Q. Are you located in the office of A. J. Ray & Son in Hillsboro? A. Yes. [216]

Q. Have you ever met Mr. Wellman, the plaintiff in this case? A. Yes.

Q. Where did you first meet him, if you recall?

A. I first met him in the Salem office, around Thanksgiving, or the day before Thanksgiving, 1947.

Q. Did you thereafter see him in the Hillsboro office of A. J. Ray & Son? A. Yes.

Q. Do you recall about when that was?

A. It was the next week, so it must have been around the 1st of December or thereabouts.

Q. Was anyone with Mr. Wellman when he came to the office at that time?

A. No, he was alone.

Q. Did you hear the conversation between Mr. Wellman and Mr. Ray? A. Yes.

Q. Do you recall what that conversation was?

A. Yes, I believe I do, substantially.

(Testimony of Emma L. Townsend.)

Q. Where did the two men talk, Mr. Ray and Mr. Wellman? Where were they?

A. In Mr. Ray's office. The door is open between Mr. Ray's office and the main office.

Q. Could you hear the conversation that took place in Mr. Ray's office? [217] A. Yes.

Q. Do you recall whether or not at that time Mr. Wellman made any request of Mr. Ray for payment of any money? A. No, he did not.

Q. You definitely recall that, do you?

A. Yes, sir; I do.

Q. Do you recall Mr. Ray making any mention of a moral obligation at that time? A. Yes.

Q. What was his statement in that regard?

A. He said that, "We feel we have a moral obligation but not a legal obligation," and by referring to "We" that would be John I. Haas, Inc., and ourselves, as representatives.

Q. Did you hear any comment at that time of a compromise settlement?

A. I am quite certain that Mr. Wellman asked if Mr. Ray thought the Haas corporation would make a compromise settlement on his late cluster hops that had been rejected.

Q. Do you recall what Mr. Ray said in reply?

A. Mr. Ray said, "Well, I don't know," he doubted that they would.

Q. Do you recall other parts of the conversation between Mr. Ray and Mr. Wellman at that time?

A. They visited more or less, generally, talking

(Testimony of Emma L. Townsend.)

about the bad mildew condition prevailing and the difficulties of picking. [218] He said all his dealings with Mr. Noakes in the Salem office had been fair and square.

Q. Who said that, Mrs. Townsend?

A. Mr. Wellman; or words to that effect.

Q. Was anything said about disposing of Mr. Wellman's cluster hops?

A. Yes. That was the principal reason Mr. Wellman stopped by. He was on his way on a fishing trip on the Wilson River, and he stopped by to inquire if the Haas organization had been able to find an outlet for the rejected cluster hops. Mr. Ray stated, "Yes, we have been working, but have not been able to find an outlet."

Q. Did Mr. Ray say anything to Mr. Wellman about Mr. Wellman making an effort to find a place for the hops? A. Yes.

Q. What did he say in that particular?

A. "You do everything you can to find a place for them yourself."

Q. Who said that, Mrs. Townsend?

A. Mr. Ray said that.

Q. Did he make any further statements on that subject?

A. He said, "We have been and we will continue to do our utmost to find an outlet for those hops."

Q. Do you recall anything further as to the conversation on that date? [219]

A. I don't believe I recall very much more.

(Testimony of Emma L. Townsend.)

Q. Was that the first time you had seen Mr. Wellman in the Hillsboro office?

A. Yes, it was.

Q. Can you state how you happen to remember that particular occasion?

A. Because I had just met Mr. Wellman for the first time at the Salem office the day before Thanksgiving, and I remember it was the day before Thanksgiving because I was on my way to spend Thanksgiving at Eugene, and I stopped in at the Salem office to visit. We don't see each other face to face in our office.

Mr. Wellman came to the Hillsboro office—when he came to the Hillsboro office it was so soon after that that it was very definite in my mind. We do not very often meet the growers in the Hillsboro office; that is, in the office, because they do not come to the office very often.

Q. Did you see Mr. Wellman in the Hillsboro office on other occasions after that, or early in December?

A. Yes, he and Mr. Kever called several times, several times in the course of the next few months.

Q. Was there any conversation between Mr. Kever, Mr. Wellman and Mr. Ray?

A. Yes, but——

Q. Did you hear any conversation between Mr. Kever and Mr. Wellman [220] and Mr. Ray?

A. Not so well. It is very difficult to hear Mr.

(Testimony of Emma L. Townsend.)

Kever. His voice does not carry so well, and I didn't pay too much attention to those visits.

Q. Did you hear any conversation at all that you can remember? A. Yes.

Q. What conversation do you recall having heard?

A. Well, in substance, the purpose, seemingly, of those visits was to continue to inquire on Mr. Wellman's part—a continuing inquiry on his part whether or not we had been able to find an outlet for the rejected cluster hops, and also the contract had been written for the 1948 crop. Mr. Wellman had sold his farm and there was a discussion about the assignment of that 1948 contract.

Q. Do you recall any further discussions when Mr. Kever was there?

A. Mr. Ray reiterated the statement that we were trying to find an outlet for the rejected hops but had not been able to do so.

Q. Did you hear Mr. Wellman, on any of these occasions or visits, ask for or demand any money?

A. No, he did not demand any money then or at the first visit.

Q. Did you hear him ask for any money? Did you hear him ask why his cluster hops had not been paid for? A. No. [221]

Q. Prior to the time Mr. Wellman came to the office in December, did you hear Mr. Ray instruct Mr. Noakes to get Mr. Wellman's permission to

(Testimony of Emma L. Townsend.)

inspect and weigh his cluster hops without such being an acceptance? A. Yes.

Mr. Kester: Was she personally present at any conversation between Mr. Ray and Mr. Noakes?

Q. (By Mr. Kerr:) Did you hear Mr. Ray give such instructions to Mr. Noakes?

A. Yes, sir; I did.

Q. Where was Mr. Ray at the time?

A. In his office.

Q. How were those instructions given?

A. Over the telephone.

Q. Do you remember the date?

A. They were given to him several times and particularly the week of September 21st to 25th.

Q. How did you know Mr. Ray at that time was talking to Mr. Noakes over the telephone?

A. Because I, without doubt, placed the call or it was placed from my desk.

Q. Do you recall what Mr. Ray said over the telephone?

A. He said he must be sure to have Mr. Wellman's permission and understanding that the sampling, inspecting and weighing of his hops would not constitute delivery and acceptance. [222]

Q. Did you later receive or hear any report by Mr. Noakes concerning his having complied with that instruction? A. Yes.

Q. In what manner did you hear or receive such report?

A. He sent in the weight tally for the hops and,

(Testimony of Emma L. Townsend.)

by a phone conversation to Mr. Ray, he said he had received permission and that is what had been done.

Q. Is it customary in the course of business in your office in Hillsboro for Mr. Noakes to report periodically to you as to what he has done?

A. Yes, more or less.

Q. Do you recall whether or not you received a report from Mr. Noakes on this subject of permission by Mr. Wellman to weigh his hops without an acceptance? A. Yes.

Q. Do you recall receiving that report from Mr. Noakes? A. Yes.

Q. How did you receive that?

A. By telephone.

Q. Is it customary for the weight tallies or weight slips to be delivered to you from the field men who weigh the hops?

A. They come in by mail, come to my desk.

Q. Look at Exhibit 2 which is now being handed to you and state whether or not you recall having seen that? A. Yes, I did. [223]

Q. Note the word "rejected" in red pencil appearing on the front of the first sheet of that exhibit.

A. Yes.

Q. Do you know who put that on there?

A. I did.

Q. When?

A. Sometime between—when the fuggles were accepted and the clusters rejected, which was sometime the last week of October.

(Testimony of Emma L. Townsend.)

Q. Why did you write that on that weight sheet?

A. Because the Wellman contract had been settled by the acceptance of the fuggles and the rejection of the late clusters.

Q. Now, there will be handed to you Exhibit 3-J. Please examine that and state whether or not you personally made that out? A. I did.

Q. *Who* initial appears on the bottom of that?

A. My own initial, "T."

Q. On the basis of what information did you make out that Hop Sample Advice?

A. On the advice and reports from Mr. Noakes.

Q. Did that Hop Sample Advice cover tenth-bale samples? A. Yes.

Q. Of whose hops?

A. Of Otto Wellman's hops.

Q. Those are clusters?

A. Clusters and fuggles. [224]

Q. Will you refer to the comment on the lower portion of the Hop Sample Advice, Exhibit 3-J? Will you read that, please?

A. "These Wellman contract hops have been weighed, inspected and sampled preparatory to settlement, but no basis has been reached. Please note that these are tenth-bale samples on the clusters."

Q. Will you explain that comment to the effect that no settlement has been reached. What did you mean by that?

A. We had received Mr. Wellman's permission

(Testimony of Emma L. Townsend.)

—that is, Ray & Son, Inc.—to weigh and inspect and sample his late cluster hops preparatory to the samples being sent to the Washington, D. C., office of John I. Haas, Inc., for their decision on the quality, and I was notifying the sample room in the Haas office that these were not—that these late clusters had not been accepted and were not delivered on the contract at this time.

Q. Did you at any time hear Mr. Ray give instructions to Mr. Noakes to reject Mr. Wellman's 1947 clusters? A. Yes.

Q. When was that? A. In October.

Q. How were those instructions given?

A. By telephone, in the office.

Q. Were you present when Mr. Ray talked to Mr. Noakes over the telephone? A. Yes. [225]

Q. Where was Mr. Ray at the time?

A. In his office.

Q. At Hillsboro? A. At Hillsboro.

Q. How did you know he was talking at that time to Mr. Noakes?

A. Because I placed the call.

Q. Just what did Mr. Ray say at that time that you heard?

A. Instructions were to accept the fuggles, deduct what advances had been made on the Wellman contracts and reject the clusters.

Q. Do you recall whether or not Mr. Ray at that time stated why the clusters were rejected?

A. The clusters were rejected because they were

(Testimony of Emma L. Townsend.)

not—the quality was not up to contract specifications.

Q. Is that what you heard Mr. Ray say over the telephone?

A. Substantially. It was because of the quality.

Q. Did you thereafter receive any report from Mr. Noakes that he had rejected the cluster hops?

A. Yes.

Q. How did that report come in to you?

A. By telephone.

Q. From whom?

A. From Mr. Noakes at the Salem office.

Q. There will be handed to you, Mrs. Townsend, Exhibit 3-Y. I will ask you if you prepared that letter? A. I did. [226]

Q. Is that your signature on the letter?

A. It is.

Q. Will you read the sentence of the letter relating to the rejection of Mr. Wellman's clusters?

A. "The Wellman clusters, 193 bales, have been rejected as per instructions."

Q. That letter is addressed to whom?

A. Addressed to John I. Haas, Inc., Washington, D. C.

Q. On the basis of what information or report did you thus report to John I. Haas, Inc., that the Wellman clusters had been rejected?

A. A conversation with Mr. Ray in person and a telephone conversation with Mr. Noakes.

Q. Do you have charge of the entries in the

(Testimony of Emma L. Townsend.)

records of A. J. Ray & Son relative to insurance carried on hops? A. Yes, with assistance.

Q. What is the practice with relation to recording in these records hops which are taken over or accepted by A. J. Ray & Son?

A. When hops are accepted, we insure them.

Q. What type of records do you make out?

A. The date, the number of bales, the sample number, the grower's name and the price per pound and so forth.

Q. Was any such record or entry made with respect to the Wellman cluster hops? [227]

A. No.

Q. Why not?

A. Because the Wellman cluster hops had been rejected; they had never been accepted.

Q. You also maintain a so-called hop book?

A. Yes.

Q. What is the nature of that record?

A. That is a record of our delivery, a record of all hops that we handle.

Mr. Kester: May I ask if, during the recess or before this case is concluded, if Counsel will submit to us for inspection these various office records he is now referring to?

Mr. Kerr: Yes, we will be glad to.

Q. Do you know what entries have been made in such hop books with respect to the Wellman clusters?

(Testimony of Emma L. Townsend.)

A. No entries have been made because we never accepted the Wellman clusters.

Q. Why were no entries made in your hop books?
A. Well, because——

Q. Why were no entries made in your hop books with respect to the Wellman cluster hops?

A. Because they were rejected and never accepted on the contract.

Q. Was the balance of all hops accepted by A. J. Ray & Son for John I. Haas, Inc., in 1947 noted in those records?

A. All the hops accepted by them? [228]

Q. Yes. A. Yes.

Q. Was such a notation made for all hops accepted by John I. Haas, Inc., in 1947?

A. Yes.

Q. There will be handed to you by the Bailiff Exhibit No. 1-B, No. 1-B being a check. Will you state whether or not Mr. Noakes reported to you that he had written that check?

A. Yes, he did report to me.

Q. Do you recall how soon after the date of the check you received that report?

A. Either it would be sometime in the evening of October 28th or it would be the next morning, the 29th.

Q. Will you refer to Exhibit No. 1 and to that sheet which is the invoice, I believe. Do you find that? Did you receive that from Mr. Noakes?

A. Yes, sir; I did.

(Testimony of Emma L. Townsend.)

Q. Approximately when did you get that?

A. It would be in the mail, either the morning or afternoon of the 29th or the morning of the 30th. Sometimes there is a day's delay between Salem and Hillsboro, between the Salem and Hillsboro mails.

Q. What is that paper that you now refer to which is a part of Exhibit No. 1, marked "E" I believe?

A. This is an accounting that our field man, in this case [229] Mr. Noakes, made on the Wellman contract.

Mr. Kerr: That is all. Thank you.

Cross-Examination

By Mr. Dougherty:

Q. Ordinarily around the end of September or the first part of October, is that a pretty busy period in the Hillsboro office?

A. Always busy at my end. I am always busy at my end in the Hillsboro office.

Q. Did you have additional assistants at that time? A. No.

Q. You handle most of this work yourself, is that correct? A. Yes.

Q. I believe you said you do not very often see growers in the Hillsboro office. Does your Salem office have most of the contacts with growers?

A. They see them in person, yes.

Q. I believe you have been here while some of the other testimony was being taken? A. Yes.

Q. Do you remember mention of some letters that

(Testimony of Emma L. Townsend.)

were sent out on and following the 25th of September, 1947, to other growers, relating to the weighing-in of hops? A. Yes. [230]

Q. Do you remember whether or not you sent such a letter to Mr. Wellman?

A. I would not have seen all these letters, naturally, but no such letter was sent to Mr. Wellman because Mr. Ray made up the list of the ones that they should go to, and it was discussed the Salem boys were doing Mr. Wellman's that day and, therefore, that was done orally and not in writing to Mr. Wellman.

Mr. Kester: Counsel has submitted these books for examination, your Honor. May it be stipulated that such matters as appear in these books may be offered at face value without the witness identifying the books? There are some very important matters in here, I can see by opening and glancing at the books, with respect to matters that have been brought into the case. Naturally we do not want to inconvenience anyone.

The Court: You had better keep the lady here. It will just be another day.

Mr. Dougherty: Thank you, Mrs. Townsend.

(Witness excused.) [231]

CATHERINE MATHESON

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

(Testimony of Catherine Matheson.)

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Catherine Matheson.

Q. Where do you live? A. Portland.

Q. What is your occupation?

A. Secretary and stenographer for A. J. Ray & Son.

Q. How long have you been so employed by A. J. Ray & Son? A. Six years.

Q. In what office?

A. In the Hillsboro office.

Q. That is the company's office in Hillsboro?

A. Yes.

Q. The Bailiff will hand you Exhibit 12. I will ask you if you can tell whether or not you typed the letter of which that is a copy?

A. Yes, I did.

Q. Do you recall the occasion when you prepared that letter? A. Yes.

Q. Do you recall whether or not you prepared similar letters to other growers? [232]

A. Yes, sir; I did.

Q. Do you recall whether or not you were told not to send such a letter to Mr. Wellman?

A. Yes, I was told not to.

Q. Who told you that?

A. Mrs. Townsend.

Q. Did she say why?

(Testimony of Catherine Matheson.)

A. Yes. Well, I overheard her discussing it with Mr. Ray.

Q. What was it you heard Mr. Ray tell her?

A. Well, he said they were in Salem that day inspecting and sampling, and that it was not necessary.

Q. That it was not necessary to do what?

A. To write him a letter.

Q. Did you ever hear Mr. Ray talk with Mr. Noakes over the telephone relative to getting Mr. Wellman's permission to weigh his hops?

A. Yes.

Q. Do you recall about when that was?

A. Well, it would have been prior to when I wrote this letter, these letters.

Q. What did you hear Mr. Ray say?

A. Well, he insisted that he get permission of Mr. Wellman before he weighed them, and then that would not constitute an acceptance of the contract, on the hop contract.

Q. Where was Mr. Ray when you heard him in that conversation? [233]

A. In his office.

Q. Where were you?

A. In the other office, in the outer office.

Q. Do you recollect hearing Mr. Ray give instructions to Mr. Noakes to reject the Wellman hops?

A. Yes.

Q. How were those instructions given?

A. Well, he told him to accept the fuggles and to reject the clusters, on the telephone.

(Testimony of Catherine Matheson.)

Q. On the telephone? A. Yes.

Q. Where was Mr. Ray at the time?

A. In his office, and I was in the outer office.

Q. How did you know on this occasion that Mr. Ray was talking to Mr. Noakes?

A. The calls are always placed in the outer office, and you can hear very easily.

Q. Do you recall an occasion when Mr. Wellman called at the office in Hillsboro?

A. Yes, sir; I do.

Q. Do you recall about when the first visit was?

A. Shortly after Thanksgiving.

Q. How do you know or how did you know at that time that it was Mr. Wellman?

A. I asked Mrs. Townsend who that was, when he came in.

Q. Did Mrs. Townsend tell you? [234]

A. Yes, she said she had met him just a few days prior to that.

Q. Could you hear what was said between Mr. Ray and Mr. Wellman? A. Yes.

Q. At that time? A. Yes.

Q. Do you recall whether or not Mr. Wellman said anything about wanting payment for his hops?

A. No, he did not.

Q. You did not hear any such request?

A. Pardon?

Q. You did not hear any such request?

A. No, I didn't.

Q. Did you hear Mr. Wellman ask why he was not paid for his hops? A. No.

(Testimony of Catherine Matheson.)

Q. Do you remember now the gist of the conversation between Mr. Ray and Mr. Wellman at that time?

A. Yes. Mr. Wellman asked if he could find an outlet or a market for his hops, and he said he would do his best and see that John I. Haas, Inc., did their best, and he also asked Mr. Wellman to do his best to find an outlet on his own.

Q. You remember that conversation, do you?

A. Yes.

Q. Do you remember anything being said about a moral obligation? [235]

A. Yes, sir; I do. Mr. Ray said we had a moral obligation but certainly not a legal obligation.

Q. How do you account for the fact, Miss Matheson, that you now remember the visits to the office by Mr. Wellman? A. I don't understand that.

Q. Is there any particular reason why you happen to remember Mr. Wellman's visits to your office?

A. Yes. I had not been accustomed to seeing hops rejected and I was very much interested in his request.

Q. Mr. Wellman's request? A. Yes.

Q. Is that the first time that a grower, to your knowledge, had come in, a grower whose hops had been rejected? A. Yes, it was.

Mr. Kerr: That is all.

Mr. Dougherty: Thank you.

(Witness excused.) [236]

C. F. NOAKES

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. C. F. Noakes.

Q. Where do you reside? A. Salem.

Q. What is your occupation?

A. Manager of the Salem office of A. J. Ray & Son, Inc.

Q. How long have you been there? How long has that been your occupation?

A. Been with the firm for 36 years; been in Salem about 21.

Q. What are your duties as Manager of the Salem office of A. J. Ray & Son?

A. The duties are to buy and receive and weigh and ship hops that are purchased for the account of A. J. Ray & Son.

Q. Were those your duties in 1947?

A. Yes, they were.

Q. How many employees are there in the Salem office?

A. Including myself there are three.

Q. Who are the others, other than yourself?

A. Clifford Davis and Ronald Troxel.

Q. How long has each of them been in the office at Salem? [237]

(Testimony of C. F. Noakes.)

A. Mr. Davis has been there for, I would say, fifteen years, and Mr. Troxel eight or nine years.

Q. What are the duties of Mr. Davis, or what were they in 1947?

A. They are what you might call field men. They go out and contact growers, and they also mark hops for shipping, receive hops, make general inspection, and general hop work in the field.

Q. Was that true also of Mr. Troxel in 1947?

A. The same, yes.

Q. Did you visit Otto Wellman's yard of cluster hops in 1947?

A. Yes, I did. I was there late August; I think the 26th of August.

Q. What was the occasion of your going out there at that time?

A. Well, we were, more or less all of us, making a survey of the different yards in which we had contracts and also to see and confirm the information of what the crop would be.

Q. Were the cluster hops at that time being harvested in Mr. Wellman's cluster yard?

A. They were not.

Q. How about the fuggles? Were they being harvested? A. Yes, practically completed.

Q. Did you go out in the cluster yard with Mr. Wellman on that occasion?

A. I went down through the yard. He was not with me all the time. I had some other boys there

(Testimony of C. F. Noakes.)

and he wanted to talk to them, and I went through most of the yard alone. [238]

Q. Was Mr. Wellman at the yard when you were there? A. Yes.

Q. Did you have any conversation with Mr. Wellman at that time? A. Yes.

Q. What was it, if you remember?

A. Oh, about general crop conditions and one thing or another; reference to some advances that would be due on the cluster hops the first of September.

Q. What was the conversation with respect to those advances?

A. Well, we talked the crop situation over there. It looked like we might run into some difficulty, into some trouble; the hops might not measure up to contract specifications, and he was rather dubious whether he wanted to pick them or not or whether he would require any harvest advance. That was about the extent of it. He wanted to know what I thought of the yard in general, if he should go ahead and pick, and I told him if they were my hops it was my opinion that he should harvest at least some of them because any quantity that he did harvest, he could sell them on the market at that time or, anyway, when he marketed them he could realize more than the cost of harvesting.

Q. What was the condition of his cluster yard at that time, as you then saw it?

A. Well, let's see——

(Testimony of C. F. Noakes.)

Q. With respect to mildew infestation? [239]

A. There was considerable mildew all through the yard, but, however, there was only small sections that were reasonably free from infection.

Q. Could you at that time tell what the quality of his cluster hops would be in the bale?

A. No.

Q. Why not?

A. I don't think anybody could. It is impossible.

Q. Why?

A. You don't know what is going to happen to them. The condition of the yard can change overnight, and he might spoil them in curing or drying or baling or something of the kind, so you couldn't make any definite prediction what they would be after he had them baled.

Q. Did you make advance payment to Mr. Wellman on the occasion of your visit of August 26th?

A. No.

Q. Did Mr. Wellman later ask for a harvest advance on the clusters? A. He did.

Q. When was that?

A. I don't know just exactly when he made the request. I made the advance on the 6th of September. He apparently had not made up his mind that he did want to harvest the hops until such time.

Q. Did you make this advance payment on September 6th promptly [240] at his request?

(Testimony of C. F. Noakes.)

A. Yes.

Q. That was for what?

A. That was \$5,000. That was half of the advances we was supposed to make—that he was supposed to get on the cluster hops.

Q. Why at that time was only half of the required advances made to him?

A. Well, because it was apparent that he would not harvest sufficient hops to fill the estimated quantity called for in the contract.

Q. Did he specify \$5,000?

A. Yes, he said that was agreeable; yes.

Q. Did you have any other conversation with Mr. Wellman relative to payment of a discount or premium on his 1947 cluster hops by reason of leaf-and-stem content?

A. Repeat that, please.

Q. I will strike the question and I will reframe it.

Did you and Mr. Wellman talk at that time, around September 6th, about the price to be paid for cluster hops?

A. No.

Q. Did you have any conversaiton with him concerning his taking a lesser price than the contract price?

A. No.

Q. Were you instructed by Mr. Ray to obtain Mr. Wellman's permission to inspect and sample and weigh his cluster hops, without [241] such being an acceptance of those hops?

A. I did.

Q. When was it you received those instructions?

A. Either the 21st or 22nd of September.

(Testimony of C. F. Noakes.)

Q. And how were they communicated to you?

A. By telephone.

Q. Will you state just what the instructions were?

A. I don't know as I can remember the exact wording but the substance of it was to get things rolling with him—to get things started, that we would have to go through some of the hops to determine whether or not they would be of acceptable or suitable quality as covered by the contract, and he said it could be arranged to make an inspection so as to go through the representative tenth-bale samples of the crop; it would be advisable to go ahead and do it, and he so instructed me to do it, and I would have to have permission from the grower, not only Mr. Wellman but the rest of them, to do that, before we made such inspection.

Q. Did Mr. Ray say anything to you about your getting an agreement from Mr. Wellman that the sampling and inspecting and weighing of his clusters would not be an acceptance of those clusters?

A. A verbal agreement, yes.

Q. What did Mr. Ray tell you about that?

A. He said if that could be arranged that we were to go ahead and make the inspection, draw samples and to further the work [242] so as to not have to come back and duplicate it, and that he would send the tenth-bale sample in to Washington for their approval.

Q. You refer to an arrangement. What do you mean by an arrangement?

(Testimony of C. F. Noakes.)

A. Well, an agreement with the grower that that would be okeh with him.

Q. Did Mr. Ray tell you not to do it unless the grower agreed the weighing would not be an acceptance?

A. He said the grower would have to agree to it before we could do it.

Q. What samples of the Wellman clusters were taken before the tenth-bale samples were taken?

A. There were several type samples taken before the inspection was made.

Q. Do you recall who took those type samples?

A. Mr. Davis.

Q. Do you recall when they were taken?

A. The first one, I believe, was on September 13th; subsequent samples, I am not sure of the date.

Q. Were they taken before the tenth-bale samples were taken? A. Yes.

Q. What was done with the type samples that were taken before the tenth-bale samples were taken?

A. We kept a part of them in our office and sent the rest to Hillsboro. [243]

Q. By "We" you mean the Salem office?

A. The Salem office, yes.

Q. Did you later talk to Mr. Wellman about the sampling and inspecting and weighing of his hops without such being an acceptance? At any time did you talk to Mr. Wellman?

(Testimony of C. F. Noakes.)

A. Before we made the inspection, yes.

Q. When was that?

A. Either the 21st or 22nd of September, right in there. I do not recall just the exact date from memory; right in there.

Q. Had Mr. Wellman requested that you weigh the clusters?

A. Mr. Wellman came to the office and said he was very anxious to get away on a hunting trip and wondered if we could not come and make an inspection of his hops, and I told him the only way we could possible do it, as we did not have any acceptance of the type samples, I was willing to go through them, make an inspection, draw tenth-bale samples and send them for approval, and it would be in no way an acceptance of the hops.

Q. Did you say anything at that time to Mr. Wellman about weighing his clusters?

A. Yes. He said that would be agreeable.

Q. Did you say anything to him about weighing his clusters?

A. Only in the conversation, I said that we would weigh them at that time, to save taking the hops out in the warehouse at a later date, and it would also save us duplicating lots of work: if we would have to go back and weigh them, it would mean just [244] another day lost for us and we would rather do so at that time.

Q. What did you say to Mr. Wellman as to such

(Testimony of C. F. Noakes.)

sampling and inspecting and weighing not being an acceptance?

A. I told him it was no acceptance of them at all at that time, and we would have to send these samples in for approval by John I. Haas, Inc.

Q. Did you tell him where the samples would be sent?

A. Yes. I said they would have to go to Washington.

Q. Did you ask him whether or not it was agreeable? Did you ask him whether he was agreeable to your weighing the hops, without that being an acceptance? A. I did.

Q. Do you recall just what you said to him at that time?

A. Maybe not in so many words, but I told him we would like to weigh them, and it certainly would not constitute any acceptance of the hops because I had no authority to accept them under any conditions.

Q. Did you tell him that? A. Yes.

Q. What did he say when you told him you would weigh and inspect and sample the hops but that could not be an acceptance?

A. He said that was okeh, all right, to come ahead, and we made a date for it, for the work to be done.

Q. Did you say anything to Mr. Wellman at that time about the quality or condition of the hops as indicated by the type samples? [245]

(Testimony of C. F. Noakes.)

A. As I recall, I mentioned to him that they did not look very good, but the exact wording I would not know. I said they were not of very good quality.

Q. Did you discuss with him at that time anything about his taking a cut in price? A. No.

Q. Did you then agree upon a date for inspecting and weighing of these hops?

A. We did. We had to make a date that was agreeable to the dealer that had the other half of the crop, as we wanted to work them both together. There was a division to be made.

Q. What was the name of this other dealers?

A. S. S. Steiner Corporation.

Q. Did you communicate with the Oregon representative of the Steiner Corporation?

A. I told Mr. Wellman I would have to make an arrangement with Mr. Eismann, and I am not sure whether Mr. Eismann called me or I called him, but we had a conversation about the fact that he would go to Mt. Angel on September 25th.

Q. Was that a conversation with Mr. Eismann?

A. Yes.

Q. Is that Howard Eismann?

A. Howard Eismann.

Q. Was that conversation over the telephone?

A. It was. [246]

Q. What was the date of that conversation with respect to the time Mr. Wellman came in, the same day or some other day?

(Testimony of C. F. Noakes.)

A. It was one of those days, two or three days before the 25th, and it is not clear in my mind just when it was, but it was just two or three days before.

Q. Did you thereafter inspect and take tenth-bale samples of Mr. Wellman's clusters?

A. Yes.

Q. When was that? A. September 25th.

Q. Where?

A. Schwab's warehouse in Mt. Angel.

Q. Who was present at that time?

A. Well, Mr. Wellman, Mr. Davis and myself, and some representative of the Steiner organization, although they were in different parts of the warehouse, and then the warehouse crew.

Q. How were the bales of clusters of Mr. Wellman in the warehouse at that time divided between you and Steiner? How was the physical division made?

A. When warehousemen line hops up, they handle them two bales at a time on the truck, and they would take them out of the pile and they lined up two bales for us and two bales for Mr. Steiner and continued that split until they were all lined up.

Q. What did you do at that time with respect to the sampling of the bales, as to the procedure you followed? [247]

A. After the hops were lined up, we would go through them with triers and draw a sample handful out of each and every bale, and place that hand-

(Testimony of C. F. Noakes.)

ful of hops on the head of the bale, and then later on we would bring a handful of the hops out to the doorway, to the light, and we would make a comparison between the tryings out of each bale with the type sample we had that was drawn previously.

If there is no appreciable difference in the hops, we would take the samples in order. If there should be a difference in them, then we would segregate them and put the different qualities on one or the other—either the front end or the last end of the row. Later we would number those bales and then weigh them.

Q. You did draw tenth-bale samples at that time?

A. Yes.

Q. What did you do with those tenth-bale samples?

A. Compared them with our type samples and we wrapped them.

Q. How were they wrapped?

A. They were wrapped in 20-inch-square paper, and fastened with a staple.

Q. Each one was wrapped separately, was it?

A. Each one was wrapped separately.

Q. Then what was done with them?

A. Then, when the lot was completed, simply tie these tenth-bale samples up, wrap them up and express them to Hillsboro. [247]

Q. Other than putting the bale numbers on the bales, as you have testified, did you and your men put any mark whatever upon the bales of the Wellman clusters?

(Testimony of C. F. Noakes.)

A. I believe not. However, there is a State code number has to be put on the head of the bale before the State Inspector will draw his sample.

Q. Who puts that number on?

A. I believe it is the warehousemen who do that?

Q. Did you or your men do it?

A. We might have done a few, but not very many. If we did, it was just an accommodation for the warehousemen.

Q. You say that is a code number that is used by the Government, is that right?

A. It is a code number used by the Department of Agriculture to identify each lot, each lot that they sample. The grower has a code number and if he has more than one lot they are classified by letters.

Q. Were samples being taken by the Department of Agriculture men at the same time you were sampling the bales? A. They were.

Q. And their samples were for what purpose?

A. Their samples were taken to the Department of Agriculture testing laboratory for a leaf-and-stem count and seed.

Q. Do you recall who asked the State Department to make that inspection? [249]

A. We did.

Q. Did you have anything to do with the actual sampling of any hops for the Department of Agriculture? A. No.

Q. Then, other than the marking of the numbers

(Testimony of C. F. Noakes.)

on the bales, the Department of Agriculture code number, was any other marking put on these bales at that time?

A. There would be the warehouse lot number, and that would be put on by the warehousemen as the hops came into the warehouse.

Q. You had nothing to do with that?

A. Nothing.

Q. Did you or your men put any marking of John I. Haas or the Haas corporation on any of these bales? A. No.

Q. At the warehouse on the 25th, in connection with the sampling and weighing of these hops, did you have any conversation with Mr. Wellman about sending tenth-bale sample in to Washington, D. C.?

A. Yes. After we completed the work and wrapped the samples up, and wrapped the samples up into bundles, we were standing there talking about it, and he said, "Well,"—Again I told him we would have to send the tenth-bale samples in to Washington for their approval of the quality.

Q. What did he say?

A. He said, "Go ahead." [250]

Q. Is that the complete conversation you had with him at that time?

A. Oh, approximately, yes. We had been talking about other things, but that was all of any consequence.

Q. Did you tell him the Washington office would

(Testimony of C. F. Noakes.)

determine whether or not the hops were acceptable?

A. Yes.

Q. At that time, on September 25th, when you inspected the Wellman hops in the warehouse, had the official Department of Agriculture analysis of the leaf-and-stem content been made? A. No.

Q. Was a weight tally or weight sheet made up at the time you weighed the hops? A. Yes.

Q. Who made that out?

A. I believe I did.

Q. Do you know what you did with that weight sheet? A. Mailed that in to Hillsboro.

Q. How soon after the 25th did you mail that sheet in? A. It was mailed that evening.

Q. It was mailed to the Hillsboro office, is that right? A. Yes.

Q. After the 25th did you have occasion to take any additional samples of the Wellman hops in the bales?

A. Oh, considerably later we drew some samples because I felt [251] we might have a place to sell them and I wanted to send some samples to another dealer.

Q. When was that, approximately?

A. The forepart of February.

Q. February, 1948? A. Yes.

A. What did you do with those samples?

A. I turned them over to Mr. Frank Kennedy.

Q. For what purpose?

A. He said he would send them to San Francisco

(Testimony of C. F. Noakes.)

and see if they could not sell them along with some other samples of some other lots.

Q. Did you send any of those samples which you took in February in to the Hillsboro office?

A. No.

Q. Did you get any instructions from Mr. Ray to reject the Wellman cluster hops? A. Yes.

Q. When?

A. Somewhere—I don't know—along the 14th or 15th of February.

Q. What were those instructions?

A. The instructions were that they would accept the fuggles and pay for them, and they would not accept the cluster hops.

Q. Did Mr. Ray at that time tell you why they would not accept [252] the clusters?

A. He might have said because the quality was not acceptable. We both knew what they were.

Q. Do you recall what he did say to you?

A. Not exactly, Mr. Kerr, no.

Q. Do you recall whether or not he did tell you the reason for the rejection?

A. It was on account of the mildew damage and picking. That was in a general conversation, yes.

Q. Mr. Ray told you that, did he? A. Yes.

Q. How was that instruction given to you?

A. By telephone.

Q. Where were you when you received the instruction? A. In the Salem office.

Q. Did you then communicate that rejection to Mr. Wellman?

(Testimony of C. F. Noakes.)

A. I called Mr. Wellman's home the following day and they said he was not there. I left word for him to call me as soon as he returned, and I don't know—I think I was talking to his wife. She said she would tell him to call me as soon as he returned.

I called a few days later. I called two different times, and I said we would like to see him just as soon as Mr. Wellman returned.

Q. Did anyone tell you at that time where Mr. Wellman was? A. Not at that time, no. [253]

Q. When did you see Mr. Wellman?

A. The late afternoon of October 28th.

Q. Where was that?

A. In the Salem office.

Q. Did you at that time tell Mr. Wellman that his cluster hops would not be accepted?

A. Yes.

Q. Did you tell him his fuggle hops would be accepted? A. Would be accepted yes.

Q. Did you pay him for the fuggle hops?

A. I did.

Q. Did you say anything to him about deducting the amount of the advances on the fuggles and clusters?

A. I told him we would have to deduct all the advances made on the contract off the proceeds of the fuggle hops.

Q. Who was present at the time you had this

(Testimony of C. F. Noakes.)

conversation with Mr. Wellman on the 28th of October?

A. Mr. Wellman was there, Mr. Davis was sitting at an adding machine, adding up some weight slips, and of course I was at the desk. Mr. Troxel was in the sample room, but he wasn't exactly present in the main office.

Q. Mr. Troxel was not in the same room?

A. No.

Q. How close were the main office and sample room?

A. Just joining, just a doorway between them.

Q. What did Mr. Wellman say when you told him the cluster hops would not be accepted?

A. I believe he said something—"what was the matter with the clusters?" or something of the kind, and I told him they did not make the grade, they were of such quality we would not accept them under the contract, or could not accept them on the contract, but they would take the fuggles and I was ready to pay for them.

Q. Did he say anything else at that time?

A. He said "Just what would happen if I refused to deliver the fuggles?"

I told him I thought it would be foolish on his part; it would simply tie the whole deal up and he would maybe lose that 90-cent sale on his fuggles, which was not the thing to do.

Q. What did he say as to that?

(Testimony of C. F. Noakes.)

A. He thought a little while and said, "Well, go ahead. It is okeh."

Q. You are being shown Exhibit No. 1, consisting of several documents. Will you examine the check, which is Exhibit 1 with a "B" and state whether or not you wrote that check?

A. Yes, I did.

Q. What was the occasion of your writing that check?

A. The balance due, proceeds of fuggles, less all the advances made on the contracts.

Q. Did you give that check to Mr. Wellman on the 28th of October? [255] A. Yes.

Q. Did he take the check? A. Yes.

Q. He received it? A. Yes.

Q. He accepted the check? A. Yes.

Q. Did he take it away with him? A. Yes.

Q. Will you examine another part of that exhibit, No. 1 with a "E," which is your invoice, I believe. State what that is, please.

A. That is an accounting of the 122 bales of fuggle hops, 23,158 pounds net at 90 cents, which amounts to \$20,842.20.

Advances on March 1st, \$5,000; May 1st, \$5,000, August 13th, \$5,000; and September 6th, \$5,000, making a total of \$20,000 advances that were deducted and it says here "Check No. S324, \$842.20."

Q. Who made that out? A. I did.

Q. Personally? A. Yes.

Q. When? A. October 28th.

(Testimony of C. F. Noakes.)

Q. Did you give a copy of that or the original of that to [256] Mr. Wellman? A. Yes.

Q. At the time you gave him the check?

A. Yes.

Q. At that time did Mr. Wellman ask you to try to dispose of the cluster hops which you had rejected?

A. Yes, naturally he wanted to sell them.

Q. What did he say about that at that time?

A. Well, he said, "I certainly want to sell the hops." He had no use for them and he wanted us to dispose of them, for us to keep trying to sell them somewhere.

Q. Did he say whether or not he might sell them himself elsewhere?

A. I am not sure that he said anything about that at that time. Later he did.

Q. Did he say anything about that?

A. Later he did.

Q. Well, did you say anything to him about his seeing if he could sell them elsewhere?

A. I wouldn't say positively that I did. I think I can recall that I did, but I would not say that I did. I did later, however.

Q. On the 28th did you state positively at that time to Mr. Wellman that the cluster hops could not be or would not be accepted?

A. I most certainly did, yes.

Q. Did you state the reasons why they were not being accepted? [257]

(Testimony of C. F. Noakes.)

A. Yes. I would not want to quote his exact words or the exact words, rather but the substance of it was that the quality was such that they would not accept them on the contract, particularly on account of the picking and also on the mildew damage.

Q. Did you report to the Hillsboro office of A. J. Ray & Son that you had rejected the cluster hops, as instructed? A. Yes.

Q. When did you give them that report?

A. Later that same evening. I telephoned Mr. Ray, probably at home. It was 5:00 o'clock when Mr. Wellman was in our office or later.

Q. Did you later show some samples of hops to Mr. Wellman in the Salem office?

A. Yes, I think so.

Q. When was that, before or after September 25th?

A. That was at a later date. I don't know just when, but I can remember we were comparing samples in our office.

Q. Was that before or after the rejection of the hops on the 28th? A. That was after.

Q. After October 28th, was it? A. Yes.

Q. Do you remember what the occasion was?

A. No, unless we were comparing quality and one thing or another [258] and he wanted to see some samples, and I obliged him by showing him several samples, along with his own.

(Testimony of C. F. Noakes.)

Q. Do you recall the conversation you had with him at that time?

A. Not word for word, no. It is not very clear in my mind, but I can remember that we had these samples down and were looking at them, but that is about all, because I didn't pay too much attention to it. We were busy, and he wanted to see some samples, and I obliged him—I pulled the samples off the shelf and showed them to him, and he compared the qualities by the—compared the qualities of the different crops.

Q. Do you recall saying anything about Mr. Wellman's clusters, cluster samples, not being at the foot of the class?

A. Well, they were not the worst ones, by any manner of means.

Q. Do you recall telling him that?

A. Yes, I think so.

Q. Were they the best of samples?

A. They were not.

Q. Did Mr. Wellman ever ask you for payment for his cluster hops? A. Not once.

Q. Did he ever ask you why he had not been paid for them? A. No.

Q. Were you authorized to accept Mr. Wellman's cluster hops of 1947?

A. No, I was not. [259]

Q. Did Mr. Wellman ever offer you warehouse receipts covering his cluster hops? A. No.

(Testimony of C. F. Noakes.)

Q. Did you ever see such warehouse receipts?

A. No.

Q. Did he ever offer you a load check covering his cluster hops? A. He did not.

Q. Did Mr. Wellman at some time talk to you about selling his cluster hops other than to John I. Haas, Inc.? A. Yes, later on.

Q. When was that?

A. I can't recall the exact date. I know that we did talk about it.

Q. Was that before or after October 28th?

A. After.

Q. Do you remember the occasion?

A. Mr. Wellman came to the office a number of times—I would not say the exact times.

Q. Was it before December, 1947, do you think?

A. I believe it was yes.

Q. Do you remember what he said at that time about selling the hops?

A. He said he was very anxious to dispose of them and for us to use every effort to sell them, and I also told him—then he [260] asked if it would be okeh if some other dealer got some samples and I said, "Most assuredly," and I said, "You sell them to him if you can, too."

Q. Is that the full conversation?

A. Approximately, I think.

Mr. Kerr: That is all.

(Testimony of C. F. Noakes.)

Cross-Examination

By Mr. Dougherty:

Q. You are Vice-President of A. J. Ray & Son?

A. That is right.

Q. You are a Director of A. J. Ray & Son?

A. No, I didn't think I was. I was not aware of it if I was. I am Vice-President anyway.

Mr. Dougherty: Is he a Director?

Mr. Ray: Yes.

Q. (By Mr. Dougherty): I understand you have been with A. J. Ray & Son for about thirty-six years? A. More than thirty-six, yes.

Q. You are now, and have been for many years, Manager of the Salem office?

A. About twenty-one years.

Q. About twenty-one years? A. Yes.

Q. As manager of the Salem office do I understand your duties [261] are to buy and receive and ship hops for A. J. Ray & Son? A. Correct.

Q. And for the Haas corporation?

A. A. J. Ray & Son represent the Haas organization, yes.

Q. Did you negotiate this particular contract with Mr. Wellman? A. Yes.

Q. That was in 1944, was it not?

A. In February, 1944, yes; yes, sir.

Q. Were the rest of the contracts drawn up at that time?

A. Yes, covering five crops; 1944, 1945, 1946, 1947 and 1948.

(Testimony of C. F. Noakes.)

Q. Did each contract contain the same provisions?

A. Yes, only they were for subsequent years.

Q. Naming a separate year? A. Yes.

Q. The printed form of contract, did Mr. Wellman provide that?

A. No, it came from our office.

Q. The typewritten rider on the contract, who prepared it? A. I did.

Q. You prepared it?

A. Yes. We wrote that out in our office. It was probably a form that we had been using on the contracts. The original came from Hillsboro.

Q. Were all of these contracts signed at the same time? A. Yes.

Q. Was the negotiation of all of these contracts one transaction? [262] A. Yes.

Q. In 1947 did you see Mr. Wellman's fuggle and cluster yards?

A. Yes, I was at the yards in late August, the 22nd, I believe.

Q. How would you describe the care and cultivation of the yard? A. Very good.

Q. When you were there in August did you notice there was some mildew? A. Yes.

Q. In the clusters? A. Yes.

Q. Was that pretty uniform over the yard?

A. Some sections were worse than others, but there was some infection all through the yard, yes.

Q. From your examination of Mr. Wellman's

(Testimony of C. F. Noakes.)

yard would you say that this so-called selective picking would have been feasible or practicable?

A. Well, it depends on what you mean by "selective picking." If you mean to go ahead and pull off a cone and look down and drop it in the basket, of course that would have been most impractical and everything else. Sometimes we use the term "selective picking" when they simply go through and drop off the lower hops. That might be termed "selective picking." If there were some good vines throughout the yard, you would go and pick those vines and leave the bad ones.

Q. Did any of those situations apply to Mr. Wellman's yard that [263] year?

A. Yes. There were vines throughout the yard that were not badly affected with mildew.

Q. But there was some mildew throughout the yard, is that correct? A. Yes.

Q. Did you advise him to pick his clusters in this so-called selective manner? A. No.

Q. Did you tell him not to pick his clusters?

A. No.

Q. The mildew that you saw was towards the end of August. Was that likely to improve after that time and before picking?

A. No, it apparently got materially worse. It would not improve to any extent. That is something that might stand still or the infection might spread over the rest of the yard.

Q. It might get worse overnight?

(Testimony of C. F. Noakes.)

A. It might get worse overnight, yes.

Q. But it was not likely to get any better?

A. It would not get no better; no.

Q. With reference to picking his clusters, did you advise him to do the best that he could?

A. Positively so, because I remember he was talking about it and said, "We will have to do the best job of picking we can to get them by at all."

Q. To your knowledge, do you know of any grower in the Willamette Valley in 1947 who indulged in selective picking?

A. Yes, I think there were some, some of the growers that left scattered vines and some that left whole sections of the yard.

Q. Were there any that had their hops picked cone by cone? A. No.

Q. What is the principal factor in producing what has been called "dirty picking"? Does that result from a condition of the vine?

A. No, it is the class of labor that is doing the harvesting.

Q. The class of labor? A. Yes.

Q. When you were out at Mr. Wellman's hop-yard on the 26th of August, do I understand you were making a survey at that time?

A. Yes.

Q. That that was in connection with the yards with which John I. Haas, Inc., had contracts?

A. Mostly, yes.

(Testimony of C. F. Noakes.)

Q. Did you look at Mr. Wellman's fuggles that were in the bin there?

A. I believe I did, yes.

Q. Did you walk out in the cluster yard?

A. Yes.

Q. On September 6th I believe you said you made the advance [265] to him on the picking, the picking advance on the clusters, to Mr. Wellman. Is that correct? A. That is right.

Q. Did Mr. Wellman at that time suggest how much of an advance he would need?

A. He agreed on \$5,000.

Q. Did Mr. Wellman say that was what they would need?

A. He said he thought that would get him through the harvest, yes.

Q. On or about September 11th did Mr. Wellman call you on the telephone and tell you what he selected as the growers' market price?

A. I believe that he did, yes. I am quite sure of it.

Q. What did he select as the growers' market price?

A. We had quite a bit of conversation on the phone. He asked me what the price of hops was and what the market was at that time, and I told him, as far as his contract was concerned, that we could get him 90 cents for his fuggles and possibly 85 cents for his clusters, and that of course they would have to come up to contract specifications.

(Testimony of C. F. Noakes.)

Q. Was that price all right with Mr. Wellman?

A. He agreed to it, yes.

Q. Was that the actual market price at that time? A. I believe so, yes.

Q. Was there any conversation about John I. Haas, Inc., insisting [266] that this be in writing?

A. No. Mr. Wellman asked if it was necessary to put it in writing, and I told him I didn't think it was necessary; that we had not done it in previous years, and it would mean a trip back home or to Mt. Angel, and I said, "If that is okeh with you, it is all right with me." A good share of our business is done that way.

Q. How long did that market continue at 85 cents on 8 per cent clusters and 90 cents on fuggles?

A. We bought clusters up pretty near to the middle of November, prime clusters, at 85 cents, I am sure. The fuggle market—I don't think we bought any. The fuggle market as a rule drops first, if there is any drop in the market, because they take a rather selective market for fuggles.

Q. Would you say the market was active or inactive? A. Very active.

Q. Very active? A. Yes.

Q. In August, 1947, among the trade, generally was it understood that there would be much of a crop or a small crop in Oregon?

A. The crop was very large. Everybody knew

(Testimony of C. F. Noakes.)

that. There was some anticipation and wondering about how many would be harvested.

Q. A very heavy set of hops that year? [267]

A. Very heavy, one of the largest, and one of the best crop prospects the State of Oregon has ever had.

Q. However, after the mildew hit, it was understood that there would be actually a short crop, short crops, produced, is that correct?

A. Yes, actually harvested; yes.

Q. Around about September 11th was there a very active market in clusters?

A. About the same. The thing had leveled off then. 90 for fuggles and 85 for clusters, that dragged along, as I remember, for a week or ten days.

Q. The growers who were not tied up on contracts, did they have any difficulty selling them? Did they have any difficulty selling hops at those figures?

A. If they had the quality that the buyer wanted, they would have no difficulty in selling them.

Q. Where did Mr. Wellman take his 1947 fuggles and clusters?

A. He delivered them to Schwab's warehouse in Mt. Angel.

Q. Was that place acceptable? A. Yes.

Q. Was it convenient to take them there?

A. Acceptable, yes.

(Testimony of C. F. Noakes.)

Q. Had he taken them to the same place in prior years under the same series of contracts?

A. Yes. [268]

Q. Did you inspect, sample, mark and weigh the hops, both fuggles and clusters, in Schwab's warehouse on or about September 25th? A. Yes.

Q. Were you the chief inspector? Were you in charge of that operation?

A. I had been in charge of the work, yes.

Q. Was the division of the hops between you and Steiner acceptable? A. Yes.

Q. Was that done in a proper manner?

A. Yes.

Q. As a matter of fact, Steiner ended up with a part of the fuggles, isn't that correct?

A. Not through any action of ours. I believe the Steiner organization bought those hops later. We didn't sell them to him; that is, Ray & Son did not sell them to him.

Q. Did you, acting for John I. Haas, Inc., request a Government inspection of the leaf-and-stem content of these hops? A. Yes.

Q. Was that inspection made at the same time you were there at Schwab's warehouse?

A. Yes.

Q. Did you observe that being made?

A. Yes. [269]

Q. Was it made in the ordinary manner?

A. Yes.

Q. Was there anything unusual at all about the

(Testimony of C. F. Noakes.)

way that inspection was made? A. No.

Q. How many samples did they take? How many samples does the Government inspector ordinarily take?

A. It is governed somewhat by the size of the crop; approximately every seventh bale.

Q. Approximately every seventh bale?

A. Yes.

Q. Do they have a tubular inspection tool?

A. They have a long tubular affair that they force into the bale; it has a plunger in it and they force the cylinder into the bale and draw out the sample, and they force this sample into a cardboard carton, a cardboard container.

Q. At the time these clusters were divided between you and Steiner, was the warehouse number on them? A. Yes.

Q. How about the Government code number? Who put it on? Was the Government code number put on them?

A. Not until they were lined up.

Q. Was the Government code number put on at that time, then?

A. Well, they were lined up. The State requires that a code number has to be on them before they will draw their samples, [270] before they will make their inspection.

Q. What is the object of that requirement?

A. They want to be sure that the identifying code number is on the bale when their sample is taken.

(Testimony of C. F. Noakes.)

Q. So they can subsequently identify the bale and the sample together, is that correct?

A. That is right. The same number has to be on this cardboard container as is on the bale.

Q. Did you number the bales that you looked at? Did you number them on the head?

A. Yes.

Q. Did you at any time place any brand number on any of these bales? A. No.

Q. They were numbered; also, the fuggles were numbered?

A. But no identifying brand or mark.

Q. There was no J. I. Haas, Inc., mark?

A. No.

Q. On the fuggles? A. No.

Q. In these cases where you actually put on a brand, the Haas corporation brand, isn't that usually done——

A. When we make shipment.

Q. ——when you make shipment?

A. Yes. [271]

Q. Did you at that time take tryings out of each bale?

A. Yes, after they were lined up.

Q. Did you have the so-called type samples there? A. Yes.

Q. Where did those type samples come from?

A. They were drawn previously by Mr. Davis

(Testimony of C. F. Noakes.)

out of the Wellman hops, there in the warehouse at Mt. Angel.

Q. Had splits of those been sent to Haas in Washington, D. C.?

A. I suppose so, yes. We sent them to Hillsboro.

Q. You have the remaining split, is that correct?

A. We draw them in pairs out of the same bale. We keep one and send them the full sample to Hillsboro. They are right side by side. It would be impossible to draw a sample large enough for us to take a split and Hillsboro have to have a split and send the rest to Washington, so we take two.

Q. Did you compare the tryings with the type samples? Did you do that in a corner of the warehouse?

A. At the doorway.

Q. You took them to the light, is that correct?

A. Yes.

Q. Is that a common practice in inspecting hops?

A. Yes.

Q. Is it common practice to inspect hops under artificial light?

A. Not warehouse light, no. We have lights in the sample room under which we do some work, but they would not be in the warehouse. [272]

Q. How did the tryings match up with the type samples?

A. They were similar, with the exception of one bale; quite similar. Let me qualify that. We had

(Testimony of C. F. Noakes.)

one small lot that was much better than any of the subsequent samples. Then, when we made our inspection we could only find that one bale; there was no more others like it.

Q. Did you thereafter discover that particular lot in sampling?

A. I asked Mr. Wellman if there was any way he could keep that separate and he said no, so we bunched them all together.

Q. Did you then select certain tryings that matched up quite well with the type samples?

A. Yes, we tried to get them more or less uniform. If there was a sample that was entirely different, then we segregated it.

Q. Did you then take your tenth-bale samples from those particular selected bales?

A. Yes, we drew the samples from those bales.

Q. Did you select these bales at random, or did you take samples from particular bales?

A. We did not adhere strictly to drawing samples out of bales which would be, numerically, 10, 20, or 30, like that. We drew our samples and tried to get representative samples of the crop rather than have them strictly adhere to certain numbers.

Q. You say "representative samples." Do you mean you tried to [273] get tenth-bale samples that compared as nearly as possible with your type samples? A. Yes.

(Testimony of C. F. Noakes.)

Q. Unless there was a material variation, is that correct?

A. If there were 'no material variation, we classed them all as equal to the type sample.

Q. Did you reject any single bale at that time?

A. No.

Q. You set out no single bale?

A. No, only this one bale we were talking about.

Q. Did you weigh in the hops?

A. Didn't weigh them in, no. We weighed them.

Q. You did weigh them?

A. Yes, we weighed them.

The Court: We will adjourn now until 10:00 o'clock tomorrow morning.

(Thereupon adjournment was taken until 10:00 o'clock a.m., February 2, 1949.) [274]

10:00 o'Clock Wednesday, February 2, 1949

C. F. NOAKES

a witness on behalf of Defendant, having previously been duly sworn, resumed the stand and further testified as follows:

Cross-Examination

(Continued)

By Mr. Dougherty:

Q. Mr. Noakes, you say you have been with A. J. Ray & Son for over thirty-six years, is that correct? A. That is right, yes.

(Testimony of C. F. Noakes.)

Q. During that time over how long a period have you done business with Mr. Wellman?

A. Oh, ten or twelve years.

Q. Have you ever made any spot purchases of his hops for John I. Haas, Inc.? A. Yes.

Q. In this series of contracts were you the one who contacted Mr. Wellman?

A. To make this contract deal, you mean?

Q. Yes, this series of contracts. A. Yes.

Q. Were you in general charge of the servicing of these contracts? A. Yes. [275]

Q. Were you in charge of obtaining chattel mortgages and recording them?

A. That was done through the Hillsboro office.

Q. Through the Hillsboro office? A. Yes.

Q. In prior years, for example 1946——

A. Mr. Dougherty, I don't know as I understood that other question exactly. I mean that the Hillsboro office filed the contract, the chattel mortgage and contract, with the court. Is that the question?

Q. Yes.

A. That is what I understood; yes. The Hillsboro office filed those contracts for public record.

Q. In 1946 did you agree with Mr. Wellman as to the growers' market price under his contract?

A. I believe so, yes.

Q. In all of those years were advances made by you or through your office?

(Testimony of C. F. Noakes.)

A. Yes. Sometimes by check from Hillsboro; other times by check from our office. That is, we delivered them and obtained a receipt, our office.

Q. Did John I. Haas, Inc., to your knowledge, ever object in any way to the manner in which you handled the Wellman contracts? A. No.

Q. Did anyone else representing John I. Haas, Inc., to your [276] knowledge, ever talk or write to Mr. Wellman?

A. Not to my knowledge, no.

Q. If any problem arose under the contract, would he call on you?

A. It would be referred to me, yes.

Q. This telegram, marked Exhibit No. 5, from John I. Haas, Inc., making certain suggestions concerning the handling or weighing in, that telegram is dated September 25th, is it?

A. Yes, sir.

Q. Had you ever seen that telegram before?

A. No.

Q. Did you see any of the original correspondence between A. J. Ray & Son and the Haas corporation? A. Well, relative to it?

Q. Yes. A. No.

Q. All of that was handled through Mr. Harold Ray, is that correct?

A. Yes; at least through the Hillsboro office, yes.

Q. Any special instructions which you might

(Testimony of C. F. Noakes.)

have would come from Mr. Harold Ray personally, is that correct?

A. Yes, or A. J. Ray & Son's Hillsboro office.

Q. Outside of such special instructions as you might receive from Mr. Ray or from his office, did you handle the 1947 transaction with Mr. Wellman in the same manner that you had handled [277] transactions in prior years under that same series of contracts? A. Yes, I believe so.

Q. With reference to Mr. Wellman's 1947 clusters, I believe you inspected them at the warehouse, did you? A. Yes.

Q. And also saw them in the yard?

A. Yes, at one time.

Q. What?

A. At one time I saw them in the yard.

Q. Would you say they contained some mildew?

A. Yes; they were affected by mildew.

Q. Would you describe them as being large, flaky hops of a greenish color? A. Yes.

Q. Would you say they were filled with lupulin?

A. I believe they were, yes.

Q. Would you say they had quite a good flavor?

A. They did.

Q. Were they—Would you say they were by no means the worst hop you saw in 1947?

A. No, they were not the worst hops.

Q. On the other hand, would you say they were not quite the best hops?

A. No, they were not the best by any manner of means.

(Testimony of C. F. Noakes.)

Q. Mr. Noakes, is it customary for you to demand warehouse [278] receipts from growers before you pay for hops? A. No.

Q. Is it customary for you to demand or receive load checks before you pay for your hops?

A. No.

Q. Did you at any time ever ask Mr. Wellman for load checks on his 1947 clusters?

A. No.

Q. Did you ever at any time ask Mr. Wellman for warehouse receipts on his 1947 clusters?

A. No.

Q. Would it have been normal procedure for you to have asked him for his warehouse receipts?

A. Not until we were ready to pay for them.

Q. Do I understand that the Haas corporation took in some mildewed hops in 1947 under these so-called prime-quality contracts?

A. I won't say that they took them in on the contracts. They handled some hops that were mildewed, yes.

Q. Were those hops that were mildewed from growers who had these so-called prime-quality contracts?

A. That would be right, yes. They are all alike. All the contracts are alike.

Q. In some cases were growers paid the full contract price for those mildewed hops?

A. Yes. Maybe hops can be affected by mil-

(Testimony of C. F. Noakes.)

dew and have some [279] other redeeming features.

Q. Would you characterize a hop that was well filled with lupulin and had quite a good flavor as a hop which had redeeming characteristics?

A. If it did not have too bad faults from some other source, yes.

Q. Were some of these mildewed hops which the Haas corporation handled, were they taken at some reduction from the contract price?

A. Some of the deals we didn't accept hops on the contract. We took them over at a reduction in price.

Q. But, in all of these cases, they were hops which were under contract? A. Yes.

Q. And subsequently the Haas corporation took those hops? A. Some of them, yes.

Q. The floor contracts which were written before the OPA went out, you still had some of those contracts left in 1947, did you? A. Yes.

Q. Did those contracts specifically refer to a sliding scale up and down from 8 per cent?

A. Not the ones that were written before OPA came into effect, no. There was no occasion to put any sliding scale for picking, as we had no method, official method, of determining leaf-and-stem count before 1944. [280]

Q. That sliding scale was used under OPA?

A. It affected those contracts when it came to the market price, yes.

(Testimony of C. F. Noakes.)

Q. Do I understand when you speak of an 85-cent market you mean an 85-cent market with an 8 per cent pick? In 1947 that was true of cluster hops? A. Yes.

Q. So you applied the sliding scale, although the contract did not contain the specific provision for it?

A. Yes, because that was the procedure or the custom in the market in that year.

Q. These instructions that have been mentioned concerning weighing-in Mr. Wellman's 1947 clusters, did you receive those from Mr. Harold Ray personally? A. Yes.

Q. Was that by telephone? A. It was.

Q. And when was that? When did you receive those instructions by telephone?

A. Sometime late September. It was getting along towards the end of the month. I don't know the exact date.

Q. Was that several days before the 25th?

A. Yes. We were talking about it at different times before that just how to proceed under those conditions.

Q. How did Mr. Ray explain those suggestions to you? Did he [281] assign any reason for them?

A. Yes, he said the quality of the crop as a whole was of such quality that he couldn't—he could see no method whereby Ray & Son would take responsibility of accepting the hops because, after all, a large share of them would not be of prime

(Testimony of C. F. Noakes.)

quality or up to quality specifications in the contract.

Q. Would it be proper to say that the harvested hops showed the same mildew that the hops in the field had been showing for the past two months?

A. If it was in the field, it would show in the samples unless—if it was general in the yard, it would show in the sample, yes.

Q. Did he tell you to be cautious in this matter, and that he was going to telegraph Haas and suggest this new procedure?

A. Yes. We were talking about it. We were all wondering just what to do.

Q. Did he say that the crop had turned out to be larger than they had expected?

A. Not then. We had expected it. My estimate shows that I thought there would be 80,000 bales harvested in the state, and that was made in August.

Q. By "We" whom do you mean? A. J. Ray & Son?

A. The men in my office and myself.

Q. You mean at the Salem office?

A. Yes.

Q. Did he say that the hop had turned out larger than John I. [282] Haas, Inc., had thought it would? A. I don't know as he did.

Q. Did he suggest to you that the Haas corporation had overbought and would probably have to reject some of the hops? A. No.

(Testimony of C. F. Noakes.)

Q. Did he suggest to you that the market was uncertain and that the Haas corporation did not know whether it would accept or reject?

A. I don't recall that the market particularly was discussed at that time.

Q. Did he discuss the effect of the grain restrictions on brewers?

A. He said—Yes, we talked about that some.

Q. Did you see Mr. Wellman at any time between the 25th of September and the 28th of October?

A. I don't recall that I did, not after we left the warehouse over there. I don't think I saw him until the 28th.

Q. How were Mr. Wellman's fuggles in 1947?

A. Aside from the pick, they were a very nice hop.

Q. The picking, what was that, 9 per cent?

A. 9 per cent by official test, the State test.

Q. After applying this so-called sliding scale, would you say Mr. Wellman's fuggle hops were prime-quality hops, prime-quality fuggles?

A. Ordinarily, a hop, even under the compromise position and [283] with the OPA pick of 8 per cent, a 9 per cent hop would not have been a prime hop.

Q. Aside from the picking were they prime?

A. Yes, I believe so. I would say Yes.

Q. With respect to the rejection that you have testified to of Mr. Wellman's 1947 clusters, did you

(Testimony of C. F. Noakes.)

receive your instructions from Mr. Harold Ray personally?

A. Ask that question again.

Q. You have mentioned rejecting Mr. Wellman's 1947 clusters. Is that correct?

A. I said we did not accept them. It is the same thing.

Q. Did you receive your instructions on that from Mr. Harold Ray personally? A. Yes.

Q. Did he give you any particular specific reason for that action?

A. He said the picking and quality otherwise was such that they would not accept them.

Q. Is that what he said?

A. I believe so, or words to that effect.

Q. Is that what he said or are you just assuming he might have said that?

A. I think he said that. I know we talked about it. It possibly wasn't those exact words.

Q. Did he give any specific reason or did you, I mean, give any [284] specific reason to Mr. Wellman in that conversation?

A. On the 28th of October, you mean?

Q. Yes.

A. I think I said that the quality was not such, that they would not take them or would not accept them.

Q. Did you say that John I. Haas did not like them and would not take them?

A. I might have, yes, in the conversation.

(Testimony of C. F. Noakes.)

Q. You remember when your deposition was taken, Mr. Noakes? A. Yes.

Q. Just for the purpose of refreshing your memory, and reading from Page 62:

“Q. The decision of John I. Haas, Inc., not to take the hops, how was that communicated to you?

“A. By telephone from Mr. Ray.

“Q. Did they give any reason for not taking the hops?

“A. Not that I know of, no. That was not conveyed to me.”

A. That is possibly so.

Q. “Q. Did you tell Mr. Wellman why they didn't take them?

“A. I just said they were not acceptable.”

A. That is right.

Q. Then is it correct, as far as you now recollect, no particular reason was ever discussed?

A. Going back a year and a half, it is pretty hard to remember just exactly what you said, but I am sure Mr. Wellman understood [285] they were not taking his hops, because we talked about it, and it definitely was understood that the quality was such that they would not accept them. I know that.

Q. In the deposition you said that no particular reason was assigned.

A. I was assuming that he knew the condition of the hops. We were talking about something that both of us were fully familiar with.

(Testimony of C. F. Noakes.)

Q. As I understand it, Mr. Wellman thought he had some pretty good 1947 clusters, is that what you mean?

A. No, he never told me he thought they were pretty good clusters.

Q. You thought they were about average?

A. Pardon?

Q. Didn't you think they were about average?

A. I wouldn't say that I ever said they were about average. As I said before, there were some hops in the lots that were considerably worse than others and there were a lot of them that were a lot better. I don't know whether that makes an average hop of them, but I wouldn't think so. It is an average of something, that is true, but whether it is average quality or not, that is out.

Q. Were your instructions to take Mr. Wellman's fuggles only if he would consent to deducting both the cluster and fuggle advances? [286]

A. My instructions were that we were to take over the fuggles at 90 cents a pound and that we had to deduct all the advances, and close the deal.

Q. Supposing Mr. Wellman had not consented to that?

A. Then he would not have sold the fuggles.

Q. You would not have taken the fuggles?

A. Not if he would not deliver them, I certainly wouldn't have taken them.

Q. So, as I understand it, your instructions

(Testimony of C. F. Noakes.)

were to refuse to take the fuggles under those circumstances?

A. Wait a minute. You made an error. Please, again?

Q. As I understand your testimony, Mr. Noakes, your instructions were if Mr. Wellman did not consent to deduct both advances from the proceeds of the fuggles you were to refuse to take his fuggles, even though they were up to contract quality?

A. My instructions were that we were to deduct all the advances. I don't know whether the other question came up or not now. I wouldn't say that it did.

Q. Were your instructions not to proceed at all unless all the advances were deducted?

A. I don't think I had any instruction to that effect at all. They just told me that.

Q. Were they——

Mr. Kerr: Let the witness answer.

A. They simply told me that we were to deduct all the advances. [287] They did not tell me what might happen if he refused to do it. I had no definite instructions from anybody as to just how to proceed if he refused to deliver the fuggles.

Q. Your instructions, as I understand it, were that this was the way it had to be done?

A. That I had to deduct all the advances, yes.

Q. And you stated to Mr. Wellman if he did not do it that way he might lose the sale of his fuggles?

A. Yes, certainly.

(Testimony of C. F. Noakes.)

Q. You received those instructions from Mr. Harold Ray personally, did you?

A. No, that was my opinion, I said.

Q. No, not your opinion, but your instructions as to how you would handle this?

A. That I was to pay for the fuggles and deduct all the advances that were made on the contract. That was my instructions.

Q. From whom did you receive those?

A. Mr. Ray.

Q. From Mr. Ray? A. Yes.

Q. Going back to this telephone conversation you had with Mr. Ray several days before September 25th, with respect to weighing in Mr. Wellman's fuggles and clusters, did this conversation relate to both his fuggles and clusters?

A. Nothing said about weighing in the hops. The instructions [288] were that we could make an inspection of both the fuggles and clusters and draw tenth-bale samples, and weigh them, if necessary, if Mr. Wellman agreed, and then send all the samples in to the Hillsboro office for approval by Washington.

Q. Did that relate to both fuggles and clusters?

A. Yes.

Q. Related to both of them? A. Yes.

Q. Were you to get the grower's agreement before inspecting any of them? A. Yes.

Q. And were you to get the grower to agree that

(Testimony of C. F. Noakes.)

such inspection might be made without committing Haas in any way? A. Yes.

Q. And did Mr. Ray advise you the grower would have to agree to that before you could inspect the hops? A. Certainly, yes.

Q. If Mr. Wellman, for instance, had not so agreed, were your instructions to go ahead and inspect the hops anyway? A. No.

Q. If Mr. Wellman, for example, had not so agreed, would you have accepted the hops anyway? A. No.

Q. Were you instructed by Mr. Ray at that time that you had no authority to either accept or reject any hops? [289]

A. That has always been my instructions, ever since I have been with the firm for thirty-six years, yes.

Q. Do I understand, Mr. Noakes, you have never had any authority to pass on whether the tenth-bale samples coincided with the type samples?

A. Oh, yes. Then it became my job to see that the crop ran and was like the type sample.

Q. Suppose you found your tryings and your tenth-bale samples fully measured up to the type sample, have you ever had any authority to weigh in a crop of hops? A. Yes, certainly.

Q. As a matter of fact, you have always had that authority, haven't you?

A. Yes; if the type sample had been accepted,

(Testimony of C. F. Noakes.)

the quality of the type sample had been accepted; yes.

Q. Were you ever advised as to the opinion of the Haas corporation on those type samples prior to September 25th?

A. I never had any direct advice from them, no. My instructions all came through the Hillsboro office, from Mr. Ray.

Q. Did Mr. Ray tell you anything about these type samples before September 25th?

A. Yes, I remember he mentioned that they did not look very good, that is, the clusters, particularly.

Q. Did he tell you anything about what the Haas corporation thought about these type samples before September 25th?

A. I don't recall that he did. The only thing that might have [290] come up would be that the general over-all picture—there would have to be something done to get the ball rolling; we had a lot of hops, and a lot of work had to be done by the end of October, and we would certainly have to be getting on the job or, well, it would be impossible to get the work done. We had to figure out some way of overcoming the difficulty.

Q. Those instructions were given to you by Mr. Ray personally, is that correct?

A. About——

Q. Weighing in or, rather, not weighing in?

A. To make the inspection, draw samples and so on?

(Testimony of C. F. Noakes.)

Q. Yes.

A. He told me not to weigh in but to weigh the hops.

Q. So, then, you had an agreement with Mr. Wellman, on that, is that correct? A. Yes.

Q. Did you pay him any money or give him any other consideration for that agreement?

A. No.

Q. Did you reduce this alleged agreement to writing? A. No.

Q. Without such an agreement, would you have inspected his hops? A. No.

Q. Without such an agreement, would you have accepted his hops? A. No. [291]

Q. When did you get authority to impose this additional condition?

A. You mean about going through the hops and making an inspection and drawing samples?

Q. Yes.

A. Mr. Ray said that was about the only way we could possibly handle them.

Q. That is not a matter covered by your contract, is that correct?

Mr. Kerr: That is asking for a legal conclusion, a conclusion of law, your Honor.

The Court: He may answer.

(Question read.)

A. It is probably a procedure that deviates from the usual custom, but it was a very unusual cir-

(Testimony of C. F. Noakes.)

cumstance and we had to work out some way of getting around the difficulty.

Q. (By Mr. Dougherty): I believe you testified you had this conversation with Mr. Wellman about the 25th—no, about the 21st or 22nd of September?

A. It was a day or so before the 25th. I can't establish the exact date in my memory, no.

Q. I believe that September 21st was a Sunday?

A. Could have been. I wouldn't know.

Q. Do you think you were even in your office on Sunday?

A. No, and Mr. Wellman would not have been there, either. [292]

Q. Do you remember what you did on Monday, the 22nd? Did you go down to Harrisburg and take in Stroda Bros.' hops at Harrisburg that day?

A. I don't recall what we did during the day, Mr. Dougherty. I don't remember. I remember I was there in the afternoon.

Q. I beg your pardon?

A. I was there in the afternoon.

Q. By "there" you mean——

A. At the Salem office. I don't recall now what I was doing all day.

Q. Do you recollect what you did on Tuesday, the 23rd?

A. Not fully, no. I have had no occasion to look up what I did. I don't remember now, exactly.

Q. On Wednesday, the 24th?

A. The same condition applied there, also.

(Testimony of C. F. Noakes.)

Q. Did you go down to Schwab's warehouse in Mt. Angel on September 24, 1947, and examine the hops of E. J. Seaman & Son?

A. I don't recall that either, now.

Q. Do you remember those hops?

A. Yes, I remember the hops. That is, I remember some things about them.

Q. That was one of the hopyards that was badly blighted with mildew, wasn't it?

A. Yes, some mildes infection; yes.

Q. Was that one of the yards that you thought might be a complete [293] failure?

A. I didn't think it would be a complete failure because I made Mr. Seaman some advances—that is, part of his harvesting advances—late in August.

Q. This telegram, Exhibit 3-A, Mr. Noakes, does that mention the same Seaman crop that is referred to? A. Yes.

Q. You thought, did you, along in the middle of August, that that crop was so badly hit with mildew that it might be practically a failure?

A. That is dated August 13th. That could have been my opinion at that time.

Q. The Seaman hops did have some mildew still in September, did they? A. Oh, yes.

Q. The Seaman hops?

A. Yes, they did.

Q. That was one of the crops that was around 14 per cent pick, wasn't it?

(Testimony of C. F. Noakes.)

A. I don't recall the picking now. The records will show that.

Q. That was one of the dirty picked, badly mildewed crops that John I. Haas, Inc., took in under the contract that year, wasn't it?

A. I know they took the hops, yes.

Q. John I. Haas, Inc., did take the hops? [294]

A. Yes.

Q. Then, on Thursday, the 25th of September, did you inspect Mr. Wellman's hops in the Schwab warehouse? A. I did.

Q. Was that one of the first cluster crops you had inspected that year?

A. One of the earlier ones, yes, up to that time. It is just possible that we might have weighed some hops, and that there was no question about quality before that time. I don't recall from memory now whether we did or not. This is the first crop that went through under the arrangement of sending in tenth-bale samples.

Q. Seaman's crop that was weighed in the day before did not go through on that arrangement?

A. I don't recall that we weighed those Seaman hops that day, but we might have. I wouldn't say for sure.

Q. As a matter of fact, wasn't Mr. Wellman's crop the last crop that went through before the new arrangement went into effect?

A. No. No; I wouldn't say that. Mr. Wellman came to me and said he was very anxious to get

(Testimony of C. F. Noakes.)

away and wanted to know if we couldn't do something about it, and I said I thought we could. I said I had already talked to Mr. Ray about this proposition of getting tenth-bale samples and sending them in for approval and he said under those conditions he thought it best to go ahead. Then he gave me orders to that effect, that I go—— [295]

Q. Did Mr. Ray explain to you at that time that he had not yet had any telegram from John I. Haas, Inc., approving that procedure?

A. Certainly they had not approved them. I knew that.

Q. I beg your pardon?

A. I was certain he had. He said they had not approved of the samples, either the type samples or any other samples.

Q. I am sorry. I mean approval of this procedure about inspecting?

A. I don't know whether he said the Haas corporation had given approval of it. I don't recall that. He said simply that he thought that was the thing to do.

Q. So far as you know, this was Mr. Ray's own personal idea?

A. That could have been, although naturally I assumed he certainly had been in correspondence with the Washington office of the Haas organization, but at that time I did not know that.

Q. How long were you weighing up the Wellman hops on the 25th?

(Testimony of C. F. Noakes.)

A. Just about all day. 318 or 319 bales is a long day's job for three of us.

Q. What did you do after you finished weighing up? A. After weighing the hops?

Q. Yes.

A. Cleaned up, of course, around, and gathered the samples up and wrapped the samples and shipped them to Hillsboro, and again, after we wrapped the samples, I told Mr. Wellman we would have [296] to send these samples in for approval. He said, "Okeh, go ahead."

Q. Did he say he didn't care where you sent the samples?

A. I just said, "We have to send these in," and I assumed he knew where they were going. I am certain he understood that.

Q. After that what did you do?

A. Well, we probably had some conversation and then went on home. It was getting late in the afternoon.

Q. Did you have any telephonic communication with Mr. Ray that day?

A. That evening, probably. I wouldn't say positively. We generally talked practically every evening.

Q. You do not now remember any particular telephone conversation that you had with Mr. Ray the evening of September 25th?

A. I either talked that evening or the following morning to the Hillsboro office and told them we

(Testimony of C. F. Noakes.)

were sending the samples in and had mailed in the weight tally, and the regular procedure. It was more or less routine.

Mr. Dougherty: That is all.

Redirect Examination

By Mr. Kerr:

Q. Did Mr. Wellman say why he was in such a hurry on this date, sometime prior to September 25th, when he asked you to inspect his clusters?

A. Yes, he said he was very desirous of going away to go to [297] Eastern Oregon on a hunting trip.

Q. And he at that time asked you to inspect his clusters, is that right? A. He did; yes, sir.

Q. When the samples were taken at the warehouse by the Government men, did they make their analysis of these samples at that time?

A. No. The Department of Agriculture field men drew these samples and they took them in to the hop laboratory in Salem, and they would go through the lab in regular routine. That is, they have to take their turn as they come in, because they have seven or eight men in the field and all of them bring in samples from different sections of the country and they are listed as they come in, and then they take their turn in going through the lab.

Q. You stated you personally thought that the Oregon crop in 1947 would be about 80,000 bales. Will you state why you had that opinion.

A. The Oregon crop particularly was one of the

(Testimony of C. F. Noakes.)

best looking; set out in the ground earlier—one of the best looking throughout the growing season in July and the forepart of August. The vine growth was very good and all indications were that we were going to have a beautiful crop.

If it had not been for the mildew, the State of Oregon would have had over 100,000 bales of hops and my opinion was that [298] out of that better than 100,000 bales of hops the growers would harvest around 80,000 bales.

Q. Did the then prevailing high prices for hops have any bearing upon your belief that there would be about 80,000 bales?

A. Naturally, if the grower thought he could sell them for a profit he was going to expend every effort to harvest them. That is common sense. It was my thought that would build up the amount of hops harvested, regardless of the quality of them.

Q. What is your opinion as to whether or not the prevailing high prices for hops in 1947 caused growers to harvest hops not of good quality?

A. Yes. Some of them had left their yards and went back and picked more hops.

Q. That is, they went back and picked more hops by reason of what?

A. Because they thought conditions were such that they might be able to sell them. Some of them made a mistake when they did it, too.

Q. You said Mr. Wellman never told you in his opinion his 1947 clusters were of good quality?

(Testimony of C. F. Noakes.)

A. Not late in the season, no. After this mildew struck, Mr. Wellman knew full well what was coming, and he was very dubious about even trying to harvest them, and that is the [299] reason we mutually agreed between us we would hold up the advances until such time as he determined whether or not he wanted to go ahead.

Q. After the Wellman clusters were in the bale, did Mr. Wellman acknowledge to you they were not of good quality?

A. He certainly was not very proud of them. I heard him say that.

Q. You say he told you he was not very proud of them?

A. Yes. I can remember that.

Q. Did he say that after they were in the bale?

A. Yes.

Q. Do you recall when he made that statement to you?

A. Not exactly. That was just general conversation. I don't know exactly when he made that remark but I do remember of him making it.

Q. Did he make any other comment to you concerning the poor quality of his hops, after they were in the bale?

A. Other than just a conversation about them I don't remember any specific words that he said about them.

Q. You said to Mr. Dougherty that you told Mr. Wellman that he would lose the sale of his fug-

(Testimony of C. F. Noakes.)

gles if he did not permit the deduction of the cluster advances. What had Mr. Wellman said to you just prior to that?

A. He asked me—you mean—Yes, he asked me what I thought if he refused to deliver the fuggles, what would happen. [300]

Q. What would happen if he refused to deliver the fuggles?

A. Yes, what would happen, if it would have any bearing with John I. Haas, Inc., as to the clusters.

Q. Was it in response to that question by Mr. Wellman that you told him in that event he would lose the sale of his fuggles?

A. I thought it would be very foolish for him to try it, that he might lose the sale at 90 cents—might lose a sale of 90-cent fuggles, and it certainly would not have been good business.

Q. After you had this oral agreement with Mr. Wellman that the inspection and weighing of his hops in September, at his request, would not be an acceptance of those hops, did you have any conversation with Mr. Howard Eismann concerning such oral agreement between Eismann and Wellman?

A. The day Mr. Wellman was in the office I naturally talked with Mr. Eismann, because they had the other half of the contract, and we would have to get together to make the inspection, as there had to be a division in the hops, and I wanted

(Testimony of C. F. Noakes.)

Mr. Eismann's man there when that division was made, so that there could be no question as to the proper division of the hops, and Mr. Wellman went to Mr. Eismann's office and said that he was going to make this inspection.

Q. Who said that? A. Mr. Eismann.

Q. He said that to you, did he? [301]

A. Yes, and I said, "You are not accepting the hops now?" And he said, "No. It is agreed that is not an acceptance."

Q. Did he say with whom he had that agreement that it was not an acceptance?

A. He said Mr. Wellman had been in the office and he had talked to him about it.

Q. At that time did Mr. Eismann say to you whether or not he had an oral agreement with Mr. Wellman that the weighing of the hops by Mr. Eismann's man would or would not be an acceptance of the hops? A. Yes, he did.

Q. This was on what date, do you know?

A. Again, that was two or three days before the 25th. I don't know the exact date.

Q. Is that the same date that Mr. Wellman came to you with the request that you weigh the hops? A. Yes.

Mr. Kerr: That is all.

Recross-Examination

By Mr. Dougherty:

Q. As I understand it, then, Steiner and Haas

(Testimony of C. F. Noakes.)

were collaborating on this whole deal, is that correct?

A. I would say no, but there were certain details that had to be worked out together, since they had the other half of the [302] crop. We would not have liked it if Mr. Eismann had stepped in and taken out his portion of the contract and said, "You can have what is left." I certainly would not have done that to him either, so we figured we would both get together so neither one could possibly question but what a proper division had been made.

Q. Do I understand, Mr. Noakes, that you and Mr. Eismann were operating under some arrangement with respect to Mr. Wellman's clusters?

A. That is my understanding, yes. That was my understanding because I talked to Mr. Eismann about it. That is the way he was working the deal as he had no authority to accept the hops at that time either.

Q. When did you have this conversation with Mr. Eismann?

A. In the afternoon of the day Mr. Wellman was in the office, just a few days prior to the 25th.

Q. As a matter of fact, Mr. Noakes, you know, do you not, that Steiner did receive Mr. Wellman's cluster hops on that same date?

A. I don't know whether he received them or not. He weighed them the same day that we did. The deals in that respect were identical.

(Testimony of C. F. Noakes.)

What I mean when I say they were identical, he told me he had this same arrangement and that he was going to Mt. Angel and make this inspection and draw tenth-bale samples to send to his New York office for approval, and I asked him, "Are you going [303] to weigh them at this time?" And he said he was.

Q. It was agreeable with you to handle the matter in the same manner that Mr. Eismann was handling it?

A. It was agreeable the way I wanted to handle it, and according to my instructions—I don't know what instructions Mr. Eismann had from his office, or anything about it, only just the words that he told me, that he was going to do it, and that he was going there and going to make an inspection and draw his samples and that he would have to send samples in for approval, and at that same time he was going to have a field man there to weigh them.

Q. Was Mr. Wellman present at this alleged conversation with Mr. Eismann?

A. I believe when I talked to Mr. Eismann he was not in the office. I am not positive of that. I think I told Otto that he had better go over to Howard's office and make arrangements over there so that we could work together and I believe he was over there but I am not positive of that either. He was either there or in our office. I don't remember now just where he was. He was there during that conversation or came back shortly after.

(Testimony of C. F. Noakes.)

Q. You said that in August Mr. Wellman knew full well what was coming. What did you mean by that, Mr. Noakes?

A. Well, he knew there was going to be some bad quality hops in the state. We all knew that, because it was very evident that there was going to be a right considerable amount of damage [304] in the yards, mildew in most of the yards around the state; not all of them, but most of the yards around the state, and 1947 was unusual in this respect, that this mildew came on, this mildew attack came late in August, when under ordinarily circumstances we would have very dry weather in which mildew does not work, but it did happen that this was a very rainy August and it brought this attack on. It had not happened that way to any extent any time before, nor since.

Q. You knew that there was mildew damage, Mr. Wellman knew it, Mr. Ray knew it and Mr. Haas knew it, is that correct? A. Yes.

Q. At what price did 1947 future contracts start, in the early part of 1947? Did they start around 45?

A. There were some made in June and July, early July and June, I believe, at 45 cents with a sliding scale, with a premium for better picking and a penalty for poorer picking.

Q. After the mildew struck were higher prices offered by dealers? A. Yes.

Q. Did the market nearly double within approximately a month?

(Testimony of C. F. Noakes.)

A. I don't know whether it was that soon or not—no, not within a month, because within the forepart of August we wrote contracts at 65 cents.

Q. Did the market then go from 45 to 65, is that correct? A. It did. [305]

Q. And from 65 to 85? A. Later, yes.

Mr. Dougherty: That is all. Thank you.

(Witness excused.)

BERT W. WHITLOCK

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name and occupation?

A. Bert W. Whitlock. I am in charge of hop inspection work on the Pacific Coast for the Department of Agriculture, for leaf-and-stem and seed content.

Q. You testified in one of the two previous hearings in this court? A. Yes, sir.

Q. Can you state when the OPA regulations governing the ceiling prices for hops were out of effect?

A. I believe September 1st, 1946.

Q. There have been no OPA ceiling prices on hops since that time, is that right?

A. That is right. [306]

(Testimony of Bert W. Whitlock.)

Q. I believe you testified in the previous case that you are in charge of the Federal Government's determination of the leaf, stem and seed content of lots of hops? A. Yes, sir.

Q. Has your office, under your supervision, compiled the averages as to leaf-and-stem content, the average of the years 1946, 1947 and 1948?

A. Yes.

Q. Of Oregon hops?

A. Yes, and of the Coast.

Q. Will you state what percentage of the hops which your office thus analyzed in 1947, that is, the 1947 crop of hops, showed 8 per cent or lower leaf-and-stem content?

A. Out of a total of 80,675 bales there were 46,206 or 57.27 per cent that carried 8 per cent or less of leaf and stem.

Q. What was the percentage of the volume which you examined which showed 11 per cent leaf and stem? A. 11 per cent only?

Q. 11 per cent only. A. 6.68 per cent.

Q. What was the percentage as to 11 per cent or more, or do you have that figure?

A. I haven't that figured up. There were 82.95 per cent that were less than 11.

Q. 82.95 per cent? [307]

A. 82.95 per cent that ran less than 11 per cent. That would be 17.05 that were over 11 per cent and on up.

Q. Oregon cluster hops?

(Testimony of Bert W. Whitlock.)

A. Well, they are all hops. We don't divide them now.

I should say here that these figures of Oregon include 1,908 bales of Idaho hops—1,905 bales. In other words, 1,905 bales out of 80,675 were Idaho hops.

Q. Do you have the figures for 1946 on the same basis?

A. In 1946 we inspected 94,050 bales at Salem. The average leaf-and-stem content was 7.67. I do not have the percentages figured for those that went 11 per cent or over. As I understood, on 1946 you did not ask that.

Q. In 1947 what was the average leaf-and-stem content of the Oregon hops and the 1,905 bales of Idaho hops that you referred to?

A. The average for the crop as a whole was 8.09 per cent leaf-and-stem content in 1947.

Q. Do you have the 1948 figures?

A. Yes, in 1948 we inspected 81,679 bales and the average leaf-and-stem content was 7.2 per cent.

Q. In making these determinations of leaf-and-stem content do you include hops or hop burrs which are damaged by mildew? A. No.

Q. Do you have the averages for the Pacific Coast?

A. I do, yes, the over-all averages for the Pacific Coast. [308]

Q. Begin with 1947, please.

A. In 1947 there were a total of 248,522 bales

(Testimony of Bert W. Whitlock.)

inspected on the Pacific Coast. The average leaf-and-stem content was 6.42.

Q. And 1946?

A. In 1946 there were 265,516 bales, and the average leaf-and-stem content was 6.05 per cent.

Q. 1948?

A. In 1948 there were 245,891 bales and the average leaf-and-stem content was 5.75.

Q. Do you know whether or not the fuggle type of hops ordinarily has a larger leaf-and-stem content than the clusters?

A. I wouldn't know.

Q. You were brought here under subpoena, were you not? A. Yes, sir.

Q. You appeared under subpoena, I should say.

A. Yes.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Do I understand that approximately one-sixth of the Oregon hops in 1947 were 11 per cent or higher of picking?

A. 17.05 per cent, yes, were 11 or over on leaf and stem.

Q. Do you have figures showing the difference between machine-picked hops and hand-picked hops?

A. No.

Q. Do you know whether machine-picked hops generally run less leaf and stem?

A. I believe, from our observation, that machine-

(Testimony of Bert W. Whitlock.)

picked hops do run cleaner than hand-picked hops, due particularly to labor trouble.

Q. I notice from the figures which you read that the Oregon percentages were higher than the Coast percentages. Is that customary?

A. It has been during the five years that the service has been in operation. The Oregon crop would run, oh, two or three per cent higher leaf and stem than California or Washington.

Q. Is that attributable to the fact that there are not so many picking machines available in Oregon?

A. That is the conclusion I would draw, yes.

Q. I notice that 1947 showed a higher average than either 1946 or 1948. Is that attributable to the labor situation in 1947?

A. Yes, I would say yes, to the labor situation and perhaps the condition of the crop that had to be picked. A crop that is mildew-damaged, it is more difficult to pick it clean. It is harder to get your pickers to do a clean job than if they are working on well-matured crops.

Mr. Dougherty: Thank you. [310]

Redirect Examination

By Mr. Kerr:

Q. When did this inspection service, set up by the Government in the determination of the leaf-and-stem content for Pacific Coast hops, begin?

A. 1944.

Q. There was no such service prior by the Government, prior to 1944?

A. No, sir.

(Testimony of Bert W. Whitlock.)

Q. With reference to the cause of the relatively higher leaf-and-stem content of the 1947 crop, would you say that the high prices for hops that prevailed at that time might have had an influence on the leaf-and-stem content?

A. I have no way of knowing.

Q. You would not want to draw that conclusion, then?

A. No, sir.

Mr. Kerr: That is all, then.

The Court: What was the price in 1948, by the way?

A. I have no data on prices.

Mr. Kerr: We will bring that out, your Honor.

The Court: Tell me.

Mr. Ray: Prior to harvesting, the market for the 1948 crop was 70 to 72 cents. Immediately after harvest time it was 65 cents. That was the highest price at which any market price contracts were settled. It declined steadily and continuously [311] until the present time when the average market is 28 cents for hops.

Mr. Kerr: Does that answer your Honor's question?

The Court: Yes.

(Witness excused.)

GILBERT DAVIS

was thereupon produced as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

(Testimony of Gilbert Davis.)

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Gilbert Davis.

Q. Where do you live? A. At Salem.

Q. What is your occupation?

A. Hop buyer.

Q. By whom are you employed?

A. A. J. Ray & Son.

Q. How long have you been an employee of A. J. Ray & Son? A. Since 1931.

Q. Continuously since that time?

A. Yes, September.

Q. You were an employee of A. J. Ray & Son in August, 1947, [312] were you? A. Yes.

Q. What were your duties with A. J. Ray & Son?

A. I am considered a field man.

Q. Did you deliver certain advances to Otto Wellman in 1947? A. I did.

Q. Do you recall what those advances were?

A. Yes. It was two advances in the spring and one at harvest time. I delivered one advance at harvest time.

Q. Did you take the type samples of his cluster hops in 1947? A. I did.

Q. When was the first time you took type samples of Mr. Wellman's 1947 clusters?

A. I believe it was right close to the 13th of September.

Q. Where did you get the type samples?

(Testimony of Gilbert Davis.)

A. At Mr. Wellman's drier, where the hops was dried.

Q. Did you take the sample from the bale or from loose hops? A. From the bale.

Q. Do you recall how many bales of clusters there were on hand?

A. There might have been three or four baled out.

Q. Did you notice at the time how far along his harvest of the cluster crop was? You, I believe, made an inspection of the field at that time.

A. He was in the act of harvesting them.

Q. Was Mr. Wellman present when you took your type sample? [313]

A. Yes, he was present.

Q. Did you have any conversation with him at that time concerning the type sample?

A. I believe I did, yes.

Q. What was it?

A. I think it was a sample that was much better than average appearance that I drew out at that time that one sample.

Q. Did he make any explanation about it?

A. Yes. That was what was supposed to have amounted to 64 bales; that type sample was supposed to represent a total of 64 bales.

Q. Did he tell you it would represent about 64 bales? A. Yes.

Q. Did he tell you where the hops were that he referred to as being 64 bales?

(Testimony of Gilbert Davis.)

A. They were in the storeroom and dry-kiln.

Q. Had they been baled as yet?

A. They had not been baled.

Q. Was he referring, then, to unbaled loose hops? A. Yes, that is right.

Q. Did he say whether or not he had obtained those hops, which he estimated would be about 64 bales, by selective picking? A. Yes, he did.

Q. What did he say about that, if you remember?

A. Well, that he had started on one corner of the yard picking, [314] with a selected group of pickers, and that he estimated that there would be about 64 bales picked by them.

Q. Did you take other type samples later?

A. Yes, I did. I believe I took some at the farm and later I was sent to the warehouse at Mt. Angel where I drew others.

Q. When you were back the second time do you recall when that was?

A. I do not recall the date that I took those at the farm the second time, but it was after that first sample that I drew.

Q. When was the third time you took type samples?

A. That was at Schwab's warehouse at Mt. Angel.

Q. When was that?

A. Well, again I don't recall the exact date.

Q. When was it with relation to the time when you took tenth-bale samples? Was it before or after that? A. Well, it was before.

(Testimony of Gilbert Davis.)

Q. Were all of those type samples taken before the tenth-bale samples were taken?

A. Yes, that is right.

Q. What did you do with the type samples?

A. One full sample was sent to Mr. Ray's office in Hillsboro. We kept a split and it was put on record in our office.

Q. Did you take those type samples in the manner and in the quantity that you customarily take such samples? A. That is right. [315]

Q. Were they all taken from bales?

A. They were.

Q. Did you at any time advise Mr. Wellman to pick or not to pick his 1947 cluster hops?

A. I did not.

Q. Did you have any discussion with him at any time with respect to whether or not he should pick his clusters?

A. I made an inspection of his yard and we would talk about the condition of his yard. I at no time advised him to pick or not to pick. That was strictly up to Mr. Wellman.

Q. Did you at any time hear a discussion between Mr. Noakes and Mr. Wellman concerning the sending of samples of the Wellman cluster hops to Washington, D. C.? A. Yes, I did.

Q. Were you present when Mr. Wellman arranged with Mr. Noakes for the sampling, inspection and weighing of Mr. Wellman's cluster hops?

A. I was in the office.

Q. Where was that? A. At Salem.

(Testimony of Gilbert Davis.)

Q. Do you recall when that was?

A. I don't recall the exact date; no, sir. It was afternoon, late afternoon, I would say, in our office at Salem.

Q. In what month?

A. In September the latter part of September. It was before [316] the 25th.

Q. What was the conversation, as you now recall it, about sending samples to Washington, D. C.?

A. Mr. Wellman asked us, after our day's work on his hops—well, he wanted to get away and he wanted us to—he was anxious to get those samples out.

Q. What were you doing in the office at that time?

A. Well, we were finishing up our day's work and we were trying to clean up and get ready to go home.

Q. Whom do you refer to when you say "we"?

A. It would be Cliff Noakes and Ronald Troxel and myself.

Q. Do you recall where Mr. Troxel was when Mr. Wellman came in?

A. No, I do not, other than probably right there at the office. There are two rooms in our office, and I believe he was there.

Q. Do you recall whether or not he was in the sample room or in the main office?

A. I don't recall.

Q. Do you recall what Mr. Wellman said at the

(Testimony of Gilbert Davis.)

time with respect to his request that you inspect and sample and weigh these hops?

A. He said, "I want you to sample my hops," or possibly "work on my hops." That is what the subject was about. He said, "I want you to—" Well, it means an inspection, is what it is. He said, "I want you to go in and make your inspection in the hops."

Q. Did he say why he wanted it done right away?

A. He wanted to go away on this hunting trip.

Q. Do you recall what Mr. Noakes told him at that time?

A. He said, "Otto, we don't have your picking analysis. We cannot take the hops in unless we have that picking analysis on them."

Q. Do you recall what else Mr. Noakes said at that time?

A. He told Otto we would have to make our inspection of those hops, and send the samples to Washington.

Q. Did he say what was to be done with the samples in Washington?

A. I don't know that he said what is to be done. What was to be done, in my opinion, was for John I. Haas, Inc., to examine these hops.

Q. Do you definitely recall at this time that Mr. Noakes told Mr. Wellman on that occasion that tenth-bale samples would have to be sent in to Washington, D. C.?

A. I certainly do.

Q. Do you recall what Mr. Wellman said?

(Testimony of Gilbert Davis.)

A. He agreed that that would be all right. He was very anxious to get away, and that seemed to be the only way we could handle this deal, and he agreed that we could go into them.

Q. Did you hear all of the conversation between Mr. Noakes and Mr. Wellman at that time?

A. Oh, I would not say. I heard all the conversation, no. I know we were trying to get things cleaned up around the office to go home and I wouldn't say that I heard all the conversation. [318]

Q. Do you recall now just what you were doing in the office at that time, what you personally were doing then?

A. No, I don't. I suppose I might have been entering some of the day's figures. In fact, that is what we had been doing.

Q. Were you present when the hops were inspected and sampled on the 25th day of August?

A. I was there all day.

Q. Did you assist Mr. Noakes in making that inspection? A. Yes, sir; I did.

Q. Did you at that time hear any conversation between Mr. Wellman and Mr. Noakes concerning the sending of samples, tenth-bale samples, to Washington, D. C.? A. Yes.

Q. What was that conversation?

A. After we had completed our day's work and were tying these samples up in bundles, and expressing them to Mr. Ray, at that time Mr. Noakes said, "We will send these samples in to Washington for their approval."

(Testimony of Gilbert Davis.)

Q. You definitely now recall that statement by Mr. Noakes to Mr. Wellman at that time?

A. I certainly do.

Q. Do you recall what Mr. Wellman said at that time in response to that statement by Mr. Noakes?

A. I believe he just said, "Well, go ahead."

Q. Were you present when Mr. Noakes instructed—do you recall [319] hearing Mr. Noakes tell Mr. Wellman that Mr. Wellman's cluster hops were not acceptable?

A. Yes. I was at the office at that time.

Q. That was at what office?

A. The Salem office.

Q. Do you recall when that was?

A. It was on October 28th in, you might say, the afternoon, the late afternoon.

Q. Who was present at that time, if you recall?

A. In the room, Mr. Noakes, Mr. Wellman and myself.

Q. Did Mr. Wellman come to your office while you were there, or was he there when you got there?

A. I believe he was there; that is, he was waiting for us when we came in from our work.

Q. By "we" what do you mean?

A. Mr. Noakes and myself.

Q. Do you recall what Mr. Wellman said at that time when you first got there?

A. Well, "What have you got on my hops?"

Q. Is that what he said?

A. I believe so, or words to that effect.

(Testimony of Gilbert Davis.)

Q. What did Mr. Noakes do or say at that time, as you recall?

A. I believe Cliff sat down at his desk and wrote up his figures, what he had done that day.

Q. Did he say anything to Mr. Wellman at once?

A. Well, "Hello," and "You had a good trip?"—like that.

Q. After Mr. Noakes had worked at his desk, what did Mr. Noakes say or do, if you recall?

A. Mr. Noakes turned to Mr. Wellman and he said, "We can't take those late hops, Otto."

Q. Did he say anything else?

A. He went on to say that, "We can take the fuggle hops at 90 cents and we are ready to pay for them."

Q. Did he say anything about deduction from the price for the fuggles?

A. Yes, I believe that he told him at that time they would deduct all advances that we had made to Mr. Wellman on his contract.

Q. Do you recall whether or not Mr. Noakes said anything about deducting—

A. Mr. Noakes said, "We will have to deduct all the advances."

Q. Do you recall what Mr. Wellman said when Mr. Noakes told him he could not accept the clusters?

A. I believe Otto more or less asked the question; he said, "What if I retain the fuggles or hold them and don't turn them over to you?"

(Testimony of Gilbert Davis.)

Q. You now definitely remember whether or not Mr. Wellman made that statement?

A. Yes, I do.

Q. What else did he say? What was Mr. Noakes' response to that [321] statement by Mr. Wellman?

A. Cliff asked him if he wanted to pass up a 90-cent delivery, 90 cents on these fuggles.

Q. What did Mr. Wellman then say, if you recall?

A. Mr. Wellman drew his warehouse receipt covering the fuggles out of his billfold and handed it to Mr. Noakes.

Q. Did he say anything?

A. I don't recall that he said anything right at that time.

Q. Do you recall what Mr. Noakes did then? Did he write out a check?

A. Yes, he did. He wrote out a check and gave it to him, and also typed out a memorandum of the deal, covering the contract.

Q. Did you see him give Mr. Wellman that check and that memorandum? A. I did.

Q. Do you recall what, if anything, Mr. Wellman said? Did you see Mr. Wellman accept or take the check? A. Oh, yes, I did.

Q. What did Mr. Wellman do when he took the check and memorandum?

A. I don't recall what he did. There was activity around the office.

(Testimony of Gilbert Davis.)

Q. Did Mr. Wellman express the consent to the acceptance of that check?

A. He took it. He took the check in his hand.

Q. When Mr. Noakes told Mr. Wellman that he would not accept the cluster hops, did he say why they were not accepted? [322]

A. I don't recall that he said we cannot accept them for any certain reason, no. I was working at the adding machine, I think, and there was other work to be done. I don't recall what he said; I don't recall that he came right out and gave a reason for not taking them.

Q. Did you hear all the conversation at that time between Mr. Noakes and Mr. Wellman?

A. Well, I was present there in the room. I believe that covers pretty well what I heard.

Q. You think you heard all the conversation that the two of them had? A. I believe so.

Q. Do you recall whether or not Mr. Wellman asked why the hops were not accepted?

A. I don't think he said that.

Q. Do you recall definitely whether or not he asked that?

A. I would say that he did not.

Q. Have you ever been authorized to accept Mr. Wellman's lot of 1947 cluster hops?

A. Oh, no.

Q. Have you ever been authorized to change any provision of the written contract between Mr. Wellman and John I. Haas, Inc.? A. No, sir.

Q. Have you ever been authorized to waive—

(Testimony of Gilbert Davis.)

A. No. [323]

Q. —any provision of the written contract?

A. No.

Mr. Kerr: That is all. Thank you.

Cross-Examination

By Mr. Dougherty:

Q. In what condition was Mr. Wellman's yard in 1947? A. As to what respect?

Q. Cultivation and so forth?

A. I would say it was in excellent condition for cultivating and stringing.

Q. As to the mildew damage in his yard in 1947, would you say it was about average of the yards that were hit?

A. I saw yards that were hit harder than that; that is, more damaged, and I saw yards that were less damaged, considerably less.

Q. Did you make the advances to Mr. Wellman under his contract after the mildew had hit his yard?

A. I believe that the advances that I made were picking advances for the fuggles, made before the 20th. He called for advances on the 20th, and I believe it was a few days before the 20th it was made.

Q. At that time did you look at his yard?

A. I did.

Q. Were his hops in the kiln at that time? [324]

A. I believe they were picking at that time, the fuggles hops, yes.

(Testimony of Gilbert Davis.)

Q. Do I understand you took your first sample of late clusters the 13th of September?

A. I believe that was the date.

Q. Didn't Mr. Wellman finish picking the late clusters about Saturday, the 13th of September?

A. I couldn't say when Mr. Wellman finished picking.

Q. This conversation you have related about 64 bales, as a matter of fact if there had been 64 bales there at that time you would have known it, wouldn't you?

A. There was either three or four bales that were baled out and I took a sample of one of them, as I recall, and that was to represent 64 bales. As soon as I drew the sample, I asked how many there would be like that and Mr. Wellman told me that there would be about 64 bales.

Q. When does John I. Haas, Inc., ordinarily put this Haas brand or seal on the head?

A. As we ship them out.

Q. As they are shipped out?

A. Yes, J.I.H., the initials.

Q. Yes. If you are selling them to Steiner, for example, would you put the Haas brand on these hops?

A. I don't recall that we ever sold hops to Steiner.

Q. These Wellman 1947 fuggles went to Steiner?

A. Yes, I understood they did. We did not sell them to him, though, but that was my understanding.

(Testimony of Gilbert Davis.)

Q. Were you with Mr. Noakes at the time the hops were inspected, samples numbered and weighed, on September 25, 1947?

A. Yes, I was there.

Q. Was that procedure in the usual manner?

A. I would say it was in the usual manner.

Q. Did you observe the Government inspector taking his samples at that time? A. I did.

Q. Was that done in the ordinary manner?

A. Yes, I would say it was in the ordinary manner.

Q. With reference to the Wellman 1947 clusters, would you say that they had some mildew discoloration?

A. They had considerable mildew discoloration.

Q. Would you describe them as large, flaky hops of a greenish color?

A. Yes, they were a large hop.

Q. Would you describe them as a whole-berried hop? A. Yes, a whole-berried hop.

Q. Would you say they were well filled with lupulin? A. They were.

Q. Would you say they had quite a good flavor?

A. A good flavor.

Q. Would you say they were about the average of the late cluster [326] hops that you saw in 1947?

A. Again, I saw hops better and I saw hops considerably worse, both ways.

Q. Just to refresh your recollection, do you remember your deposition? A. Yes, I do.

(Testimony of Gilbert Davis.)

Q. Reading from Page 21: "Go ahead and tell us about the hops you took," and your answer, "I believe they were about average.

"Q. About average?

"A. For what I had seen."

Would you say that was correct?

A. It is possible to read ahead a little and see what that related to?

Q. Ahead or before? A. Before.

Q. "Q. So far as mildew was concerned, they were about average, is that correct?

"A. You mean for the amount of mildew that was in the hops?

"Q. Yes, for the hops which you inspected in the Willamette Valley in 1947.

"A. Well, the hops that we took, I wouldn't say that they were——

"Q. The question was the hops which you inspected. Go ahead and tell us about the hops you took.

"A. I believe they were about average. [327]

"Q. About average?

"A. For what I had seen."

Do you consider that Mr. Wellman's 1947 clusters were about average for the 1947 clusters that you saw?

A. Well, I saw hops that I thought that had, you might say, no mildew, and I saw hops that had a lot of mildew and Mr. Wellman's hops was in be-

(Testimony of Gilbert Davis.)

tween. I seen some that had more mildew than Mr. Wellman's. Does that answer your question?

Q. Was the statement that I read from the deposition correct at the time you made it?

A. I still don't get whether it was average on the vine or average in the bale. I am not quite clear there. That is why I asked you to go further back and read.

Q. What do you think? Were they average in the bale? A. Pardon?

Q. What do you now think? Were they about average when you saw them in the bale?

A. Well, I believe they were an average hop.

Q. You considered that they were well baled?

A. Oh, yes.

Q. This conversation that you have testified to between Mr. Wellman and Mr. Noakes several days before the 25th of September, what time of day was that?

A. I would say it was late in the afternoon, fairly late in the afternoon, maybe 4:30 or around that time. [328]

Q. Would you say it was in the evening, after supper?

A. Oh, no. We had not left the office to go home for supper.

Q. Was there any agreement reached between Mr. Noakes and Mr. Wellman at that time?

A. I thought there was, yes.

(Testimony of Gilbert Davis.)

Q. How did you consider that Mr. Wellman agreed to this? A. He agreed to this?

Q. Yes, the arrangement that you have testified about.

A. Oh, making an inspection of his hops? Well, I don't—we just don't go into a man's hops unless he agrees to let you go into them. He has to give you permission to make an inspection of his hops. They are his property.

Q. Didn't Mr. Wellman ask you that you inspect his hops so he could go hunting?

A. He did, yes.

Q. Is there any additional permission required if he asks you to inspect them?

A. No. That is what I thought you had reference to.

Q. Then what did Mr. Noakes say after Mr. Wellman asked him to go through his hops?

A. He said, "I think we can make arrangements to do it, to do this work."

Q. Did Mr. Noakes at that time say inspecting and sampling and marking and weighing the hops would not constitute an acceptance?

A. He did. I don't know whether he used those exact words, but [329] he said, "We will have to send these samples, these tenth-bale samples, back to Washington for their approval."

Q. What does that mean, he would have to send the tenth-bale samples back to Washington?

(Testimony of Gilbert Davis.)

A. "We will have to send them back there for their acceptance."

Q. Is that what he said? Did he tell Mr. Wellman that? A. He did.

Q. As a matter of fact, that practice of taking tenth-bale samples and sending them East is new?

A. We always send them to Hillsboro and they, in turn, I understand, send them East.

Q. Hasn't that always been the practice since you have been employed by A. J. Ray & Son?

A. We always send our samples to Mr. Ray and I understand that he sends them all back East.

Q. Do you also understand that John I. Haas, Inc., shows these tenth-bale samples in selling the hops?

A. That is my understanding; yes, sir.

Q. With reference to the same deposition, Mr. Davis, with reference to this conversation about inspecting the hops, at that time you were asked this question:

Q. Was anyone else present at that time?

A. Mr. Noakes and Mr. Wellman.

"Q. And yourself?

"A. And myself. We came in on an evening to work. I recall [330] that was the time that it happened."

Mr. Kerr: What page?

Mr. Dougherty: Page 30.

A. Can I explain that?

Q. Please do.

(Testimony of Gilbert Davis.)

A. After we did our day's work, we came to the office to write up our figures, set down our figures and what we have done. We always make it a point to come to the office and from there we go home. Does that clear that up?

Q. And by "evening" there you mean afternoon?

A. It must have been either from 4:30 on—that is an estimate. I don't know the exact time. That is an estimate.

Mr. Kerr: Will Counsel indicate what day we are talking about now, in fairness to the witness?

Mr. Dougherty: The witness, I think, understands.

A. Prior to—I said it was prior to the 25th of September.

Q. Then, continuing with the deposition:

"Q. What was it exactly Mr. Noakes said to Mr. Wellman at that time?"

That was the question that was asked, and you replied:

"A. That it would be possible to make the inspection, and the inspection would be to get our samples out of them and submit them to John I. Haas."

A. Yes.

Q. Is that substantially correct? Is that what Mr. Noakes told [331] Mr. Wellman?

A. I believe it was.

Q. Did Mr. Noakes tell Mr. Wellman it would be possible to make the inspection?

(Testimony of Gilbert Davis.)

A. That he thought it would be possible to arrange the work, our work, and you have to make arrangements with the warehouse, and I think Mr. Noakes told him that he thought that would be possible, that it would be possible to make those arrangements.

Q. And that you draw your tenth-bale samples?

A. That is right.

Q. And that you send them to John I. Haas, Inc., as usual? A. That is right.

Q. Then, continuing:

“Q. For inspection by——

“A. Yes, for his inspection.

“Q. Did Mr. Noakes say that they were to be submitted to the Haas corporation back East?

“A. Yes.

“Q. Then what did Mr. Wellman say?

“A. That he wanted them inspected.”

A. Yes.

Q. Is that what Mr. Wellman said, that he wanted his hops inspected? A. That is right.

Q. “Q. You said that there was an agreement between them at [332] that time. What was that agreement? How was it expressed?

“A. I don’t recall saying agreement, but, as I recall, Mr. Wellman wanted—he asked to have his hops inspected and Mr. Noakes said that he would arrange to go through them and make his inspection.” A. Yes.

Q. Is that what occurred?

(Testimony of Gilbert Davis.)

A. I believe it is.

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. With reference to the 64 bales, you say Mr. Wellman told you he would have 64 bales, when you took your first type sample. Were those 64 bales then baled or were they in the bin?

A. I think there were three or four—I don't know exactly—that was baled, sitting there in the storeroom. The rest of them, I understood, was up in the storeroom, loose.

Q. Was that first type sample you took at that time like your subsequent samples?

A. There was no comparison.

Q. In what way?

A. The first ones showed, if any, very little mildew.

Q. What about the later samples that you saw?

A. There was considerable mildew. [333]

Q. In the later samples that you saw did you notice any nubbins or small, immature hops?

A. Oh, yes. There were a lot of nubbins that they shook off the vines into the baskets. It was quite noticeable. That was in the samples.

Q. Would you call these nubbins whole-berried hops? A. Oh, no, not whole-berried.

Q. When you refer to whole-berried hops, in answer to the question by Mr. Dougherty, do you mean to include those mildewed hops or nubbins?

(Testimony of Gilbert Davis.)

A. I don't believe I told Mr. Dougherty there were nubbins in there, but there are certainly nubbins in the samples. They will show that if you inspect them.

Q. The samples of the Wellman clusters that you saw, were they cleanly picked?

A. I would say they were not cleanly picked.

Q. Did they show the presence of a substantial quantity of leaves and stems? A. They did.

Q. Was mildew damage to the hops visible when you looked at the later samples? A. Yes.

Q. Was that damage easily seen or was it something you had to search for?

A. No, mildew damage stands out. You can certainly tell it from [334] a hop that does not have mildew damage.

Q. Did that mildew damage stand out on the samples that you saw?

A. It did, quite plainly.

Q. On September 13th, when you drew the first type sample of Mr. Wellman's clusters, had you seen many hop samples of the 1947 crop?

A. Not a great many; some, yes, but not a great many; principally fuggles.

Q. Do you have any means of knowing or determining what the average Oregon 1947 lot of hops looked like?

A. Only samples I got to see are those that we drew.

Q. With reference again to the conversation between Mr. Noakes and Mr. Wellman concerning the

(Testimony of Gilbert Davis.)

weighing of Mr. Wellman's cluster hops, sometime before September 25th, do you now recall any statement by Mr. Noakes at that time to Mr. Wellman that the samples, the tenth-bale samples, would have to be sent back to John I. Haas, Inc., in Washington, D. C., for decision there as to whether or not they would be accepted?

A. Yes. Mr. Noakes said, "We will have to send the samples in, the tenth-bale samples. We will have to make our inspection and send these tenth-bale samples in to Mr. Ray and then on to John I. Haas, Inc., in Washington."

Q. Did he say he had to send them in to the Washington office?

A. I don't know whether he came right out and said the Washington [335] office. Most of the conversations were carried on while I was probably working at something else there, but I heard him say, "We will have to send these samples in."

Q. And that was prior to the 25th of September, is that right? A. That is right.

Q. Did you also hear such a conversation after the hops were weighed? A. I did.

Q. What was it that Mr. Noakes said at that time to Mr. Wellman about sending samples in to the Haas corporation?

A. "We will have to send these samples in for their inspection."

Mr. Kerr: That is all.

The Court: Step down.

(Witness excused.)

(Thereupon a recess was taken until 1:30 o'clock P.M. of the same day.) [336]

Court reconvened at 1:30 o'clock p.m., February 2, 1949.

RALPH E. WILLIAMS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Ralph E. Williams, Jr.

Q. Where do you reside? A. Portland.

Q. What is your business?

A. Hop dealer.

Q. Under what name?

A. Williams & Hart.

Q. Where is the office of your firm located?

A. Here in Portland.

Q. You have testified in the previous cases here in court? A. Yes.

Q. Will you state whether or not 11-per cent leaf-and-stem content is cleanly picked, as that term is commonly used in the hop trade?

A. It is not. [337]

Q. Did your firm, Williams & Hart, buy at least some of the late cluster hops Otto Wellman produced in 1947? A. Yes.

Q. How were those purchased by your firm, on sample or otherwise? A. On sample.

(Testimony of Ralph E. Williams.)

Q. Strictly on sample? A. Yes.

Q. You appear here under subpoena, do you?

A. Yes.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. You bought 386 bales of late cluster hops in the first part of May, 1948, is that correct?

A. I don't remember the exact date, but approximately. It was in the spring.

Q. Did you pay 31 cents a pound for them?

A. As I recall, that was the price. I do not have a direct recollection of the price.

Q. From your recollection of the transaction, Mr. Williams, would you say that was the growers' market price for that type of hops at that time?

A. Yes, I would say so, by virtue of the fact we were in a [338] fairly limited market, and that in a fairly market, such as we had in the spring of 1948, each transaction in and of itself more or less created a market.

Q. From your knowledge of the hop business, Mr. Williams, would you say that the price which you paid Mr. Wellman for 386 bales late cluster hops was a fair price?

A. Yes, I would say so.

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. If you had been able to find prime-quality

(Testimony of Ralph E. Williams.)

hops at that time, would you have paid the grower that price for them?

A. Providing I could have found an outlet; in other words, providing I could have found a consumer who would be willing to pay the price that prime hops were quoted at.

Q. Do you recall whether or not there were any prime-quality 1947 hops available at that time?

A. My recollection is that if there were, they were very limited and, you might say, strongly held. I don't recall any transaction that took place in prime hops between a grower and a dealer.

Mr. Kerr: Thank you.

(Witness excused.) [339]

HOWARD EISMANN

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. State your name, please.

A. Howard Eismann.

Q. Where do you live? A. Salem, Oregon.

Q. What is your business?

A. I am in the hop business.

Q. Are you connected with S. S. Steiner, Inc.?

(Testimony of Howard Eismann.)

A. I have charge of their business in Oregon.

Q. You have testified in a previous case in this series of cases? A. I have.

Q. Before this Court? A. That is right.

Q. Have you examined samples of the Otto Wellman late clusters, 1947 crop of hops, which are in evidence here as Exhibit No. 11? A. I have.

Q. Will you state the nature and type of light under which you examined them, daylight or artificial light or what?

A. I examined them in daylight by that window.

Q. What is your opinion as to whether or not the hops of which [340] Exhibit No. 11 are samples were prime-quality hops when the samples were drawn from the bales?

A. They were not prime.

Q. Why not?

A. Because they were dirty picked and contained a great quantity of downy mildew, downy-mildew damage.

Q. How is that downy-mildew damage apparent from the samples?

A. In these particular hops it is primarily the so-called nubbins and then a decided damage to many of the burrs, and there are a few burrs which did not properly develop on account of downy mildew—partially developed but not completely.

Q. Is that quantity of nubbins you found a substantial quantity in each sample?

A. Yes, it is substantial.

(Testimony of Howard Eismann.)

Q. Is that mildew damage readily apparent from an examination of these samples.

A. Yes.

Q. Is there any question in your mind as to the presence of mildew damage in those samples?

A. None whatsoever, in the samples I looked at here.

Q. Were those hops well and cleanly picked, would you say? A. No.

Q. Is the term "cleanly picked" generally used in the hop trade as to hops which contain 11 per cent leaves and stems? Is that generally considered in the hop trade to be a cleanly picked [341] hop?

A. No.

Q. Were they, in 1947, considered to be a cleanly picked hop? A. No.

Q. State whether or not the Wellman hops which you have seen—samples of which you have seen, the samples referred to, are of even color?

A. They are not of good and even color.

Q. Are they of even color? A. No.

Q. Why not?

A. Because of the fact that many of the burrs have been damaged by downy mildew which gives them a brownish-red appearance.

Q. Are they free from damage by disease?

A. No.

Q. Would you say, basing your judgment on the samples in evidence here, and which you have examined, that at the time those samples were drawn

(Testimony of Howard Eismann.)

from the bales the hops were in good, merchantable order and condition?

A. I didn't understand that.

Q. Judging from the samples which you have seen——

A. Yes.

Q. ——and which are in evidence as Exhibit 11——

A. Yes.

Q. ——what is your opinion as to whether or not the hops from [342] which those samples were drawn were of good, merchantable order and condition?

A. They would not be good, merchantable hops. They would be merchantable, I would say, yes, but not good, merchantable hops, and that term usually applies to the appearance of the bale.

Q. In your opinion, is there any possible doubt as to whether or not the hops, the samples of which you say you have examined, were prime-quality hops?

A. There is no doubt in my mind.

Q. Did you have a conversation with Mr. Clifford Noakes of A. J. Ray & Son in September, 1947, relative to an arrangement for the inspection and weighing of the Otto Wellman 1947 cluster hops?

A. I did.

Q. When was that, if you remember?

A. It was on or about—it was one or two or three days prior to September 25, 1947.

Q. What was the occasion for your having that conversation with Mr. Noakes?

(Testimony of Howard Eismann.)

A. Well, the occasion was that Mr. Wellman had asked us to do something about his hops and, before doing so, I wanted to check with Mr. Noakes.

Q. By "us" you mean who? You say Mr. Wellman "asked us." A. S. S. Steiner, Inc.

Q. Where is the office of that firm? [343]

A. 308 Oregon Building in Salem.

Q. Did Mr. Wellman come to your office, or did he telephone? A. He came in.

Q. What was the conversation that you had with Mr. Wellman at that time?

A. Well, of course, he had been asking us, as I said, to take delivery of his hops or do something about them, and on that day I had instructions from our New York office as to the handling of this particular deal.

We had submitted two samples—two or more samples, I should say. One was drawn on September 11th, according to our records in the office, and then again on September 16th we got some further samples of the late clusters.

Q. These were samples of Mr. Wellman's late clusters, 1947?

A. Yes. The New York office had been in receipt of these samples and had given me instructions to the effect that I could take delivery of the fuggles and, as far as the late clusters were concerned, the samples appeared to be mixed; there was one that appeared to be fairly good and the others were poor.

(Testimony of Howard Eismann.)

My instructions were, due to that difference the hops would have to be inspected and leaf-and-stem analysis determined before I could accept any late clusters.

I explained this to Mr. Wellman and he said to me, "Well, you know, I want to leave and I want to get this thing cleaned up," and I told him that was the only circumstances under [344] which we could work the hops, that is, subject to the firm's later acceptance after they had viewed the samples of the late clusters.

His reply to me was, "Okeh. Go ahead," or words to that effect.

Q. Did you at that time tell Mr. Wellman it would be necessary for you to send tenth-bale samples of his late clusters in to New York, the New York office of S. S. Steiner, Inc.?

A. I don't recall that I used the words "tenth-bale samples." I think I used "inspection samples."

Q. Did you tell him it would be necessary to send inspection samples in to New York for S. S. Steiner, Inc.?

A. On the late clusters, definitely. We had permission to take the fuggles on sample, you might say, and they were pretty good hops.

Q. Did you have an oral agreement at that time with Mr. Wellman concerning such inspection and weighing not being an acceptance of the late clusters by S. S. Steiner, Inc.?

(Testimony of Howard Eismann.)

A. That was the substance of our understanding, that we make our inspection—we did not mark them. We marked the fuggles later on, but we did not mark the late clusters. It was the substance of our understanding that our inspection and weighing of the hops would not constitute an acceptance at that time, until we received approval from Steiner of our inspection samples.

Q. Did you at that time have a definite understanding with Mr. Wellman [345] to that effect?

A. I did.

Q. Did Mr. Noakes at that time, or about that time, indicate to you whether or not he had a similar understanding with Mr. Wellman?

A. I called Mr. Noakes, I think before I told Mr. Wellman definitely that we would go ahead, to see whether or not Mr. Noakes had any kind of an understanding about it.

Q. What did Mr. Noakes tell you at that time?

A. He told me, "I have the same understanding with Otto," and I thought it was all right to go ahead.

Q. By the "same understanding" what, specifically, do you refer to?

A. The understanding that the hops were not being accepted; in other words, that the inspection, weighing and so forth did not constitute an acceptance.

Q. At that time did Mr. Wellman tell you why he was desirous of having the hops inspected at that time?

(Testimony of Howard Eismann.)

A. Oh, he mentioned he was going to go hunting. He was in a hurry, I know.

Q. Will you state why you considered it advisable to have an understanding with the grower, with Mr. Wellman, that the inspection and weighing of his hops would not constitute an acceptance of the hops?

A. I had definite instructions from our office in New York to [346] proceed in that way.

Q. Do you know why such instructions were issued to you?

A. Well, in Mr. Wellman's case, as I said, the samples were mixed. There was one sample that appeared to be very good and the others were bad. There was no way to determine how much good quality or how much poor quality there might be until we inspected the hops.

Q. Was there anything unusual about the 1947 situation with respect to the Oregon hops which caused this arrangement to be required by your principal, whereby inspection samples would be sent back to their main office for acceptance or rejection there?

A. Well, with our company it is not a new innovation, exactly. In a case such as this, where the lot, based on the type sample, appeared to be very good, we have done that before.

Q. Did Mr. Wellman later deny he had made any such agreement or had any such understanding with you?

(Testimony of Howard Eismann.)

A. Well, he didn't exactly deny it, but he never would confirm it, either.

Q. Just what do you mean by that, Mr. Eismann, that he did not exactly deny it but would not confirm it?

A. Well, I don't think I have ever asked Mr. Wellman point-blank, face to face, about it but, yes, he denied it, as far as that is concerned.

Q. Will you state the circumstances under which he denied it? [347]

A. Just refused to recognize it.

Q. Did S. S. Steiner, Inc., accept Mr. Wellman's 1947 clusters or your portion of the clusters covered by his contract?

A. We never did accept the clusters, or any part of them.

Q. Why not?

A. They were definitely of poor quality and could not be used by our organization at any price.

Q. Did the contract you had with Mr. Wellman covering one-half of his 1947 production of late cluster hops call for a hop of good quality? Did it call for a hop of good color?

A. Yes, it did.

Q. Well and cleanly picked?

A. Yes.

Q. Did it call for, in general, a prime-quality hop?

A. Yes, although it does not specify the word "prime."

Q. State whether or not the rejection by Steiner, Inc., of the Wellman 1947 late cluster hops was on

(Testimony of Howard Eismann.)

the ground that the hops did not come up to the contract specifications?

A. That is the fact, and we so advised Mr. Wellman, I think it would be the latter part of October.

Q. Reference has been made in the testimony in this case, introduced by the plaintiff, to a compromise settlement of S. S. Steiner, Inc., with Mr. Wellman concerning those particular hops. Was such a settlement made with Mr. Wellman?

A. It was. [348]

Q. Will you state the circumstances under which that settlement was made?

A. Of course, after Mr. Wellman brought suit against us, we could not use the hops and finally made a cash settlement with Mr. Wellman in Mr. Shields' office, you might say, for the nuisance value. We never admitted any liability on the deal, but we do not want to go to court for various reasons.

Q. Did Steiner, Inc., ever acknowledge that by weighing the late cluster hops it had accepted the hops? A. No.

Q. Did anyone representing you or S. S. Steiner, Inc., in connection with the weighing of the Wellman cluster hops in 1947 execute any document which indicated acceptance or receipt of these particular hops?

A. That is one of the main reasons why we made the settlement for the nuisance value.

Q. Will you state the circumstances of that?

(Testimony of Howard Eismann.)

A. There were two things, Mr. Kerr. Do you want both of them?

Q. If you please; yes.

A. To begin with, Mr. Wellman contacted the man who buys hops for us on commission. He is not a steady employee, and this man allowed Mr. Wellman to make his price selection, and this agreement was drawn up on a purchase sales slip, which is the wrong form for the purpose. We had this to contend with, and we were afraid it would be construed that the man had full authority to act for us, in case we had to go to court. [349]

Q. Was that agreement which you say was signed by the broker signed by him after the hops were in the bale?

A. There were just a few hops baled at that time.

Q. What was the second consideration mentioned?

A. The second consideration was the form of weight sheet which we had used which states on the top of it "Hops Received," and of which Mr. Wellman had a copy.

Q. Was that weight sheet which you say had the words "Hops Received" intentionally executed as an acknowledgmet of the actual acceptance of those hops? A. No, it was not, definitely.

Mr. Dougherty: The document is here, your Honor, and speaks for itself.

The Court: He may answer.

(Testimony of Howard Eismann.)

Mr. Kerr: The document is not here.

The Court: He may answer. Hurry along.

A. It was not meant as an acceptance of the hops by us.

Mr. Kester: We would like to have it marked, if the Court please.

Mr. Kerr: I would like to see it and show it to this witness. This is the first time I have seen it.

Mr. Kester: The first time it has come up in the case.

Q. (By Mr. Kerr): Is Steiner, Inc., a competitor of John I. Haas, Inc.?

A. I think that John I. Haas, Inc., and S. S. Steiner are the [350] two largest hop dealers and naturally there is a great deal of competition between them.

Q. Can you explain why it happened that half of the Wellman late cluster crop was contracted to one firm and half to the other?

A. We were both trying our best to buy the crop; at the time Mr. Wellman finally decided to split it.

(Group of Weight Slips, S. S. Steiner, Inc., marked Plaintiff's Exhibit No. 16.)

Mr. Kerr: Will you hand to the witness what has been marked as Exhibit 16. Will you state what that is Mr. Eismann.

A. That is our weight sheet that was used.

Q. Is that the weight sheet that was executed in connection with the Wellman 1947 cluster hops?

(Testimony of Howard Eismann.)

A. That is correct.

Q. That was executed on behalf of S. S. Steiner, Inc., is that correct? A. That is right.

Q. Is that the weight sheet that you referred to as having the words "Hops Received" on the top of it? A. Right.

Q. You appear here under subpoena, do you not? A. I do.

Q. Is that weight sheet, Exhibit 16, initialed by anyone?

A. Initialed by Mr. Kerr who was employed by us. [351]

Q. That Kerr was not myself?

A. No, Mr. Ray Kerr.

Q. Did he have authority to initial that?

A. He did, but there was no authority given at this time to give Mr. Wellman copies of these weight sheets. To this date I don't know how he got them. Mr. Kerr does not remember giving them to him, nor by any of my other men, as far as that is concerned.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Does the Steiner corporation have any litigation pending at present involving similar questions, Mr. Eismann? A. No question like this.

Q. Is the Steiner corporation involved in hop litigation at present, in Oregon?

(Testimony of Howard Eismann.)

A. We have two suits pending in Polk County which are for the return of advances made.

Q. 1947 advances? A. That is right.

Q. You are suing to obtain back the advances that were made, is that correct?

A. That is correct.

Q. You spoke about the nuisance value of Mr. Wellman's action [352] against S. S. Steiner. What do you mean by the term "nuisance value"?

A. I think that is a term that covers anything that is a nuisance.

Q. Was there a substantial settlement made in that case? A. Quite substantial, yes.

Q. Quite substantial? A. Yes.

Q. In addition to the cash which Steiner paid Mr. Wellman, Mr. Wellman was permitted to sell the hops in addition, is that correct?

A. Well, we would not take the hops for any money ourselves.

Q. Steiner did not take the hops and Mr. Wellman was permitted to sell them, is that correct?

A. Naturally.

Q. The sales slip that you mentioned that Steiner's field men signed for Mr. Wellman, is that similar to the sales slip involved in the Smith and Geschwill cases here?

A. I didn't see that sales slip. It is the ordinary standard form that the men use in the field for buying spot hops.

Q. Would it be correct to say that is a slip that is ordinarily used in making spot purchases?

(Testimony of Howard Eismann.)

A. That is right. That is what we consider. That is one of the reasons we decided not to stand on our rights.

Q. Mr. Eismann, you said you could now, from an examination made at this time, determine what these hops were like at the time [353] the samples were drawn?

A. You can, on some definite factors.

Q. Could you tell now what the flavor was when they were fresh hops? A. No.

Q. The mildew markings do not improve with the course of time, is that correct?

A. Well, I think the downy-mildew markings would stay about the same.

Q. But the hops otherwise would deteriorate, is that correct?

A. That is right. Certain features of the quality would deteriorate.

Q. When Mr. Wellman asked you to take in his hops, and you called up Mr. Noakes on the telephone, was Mr. Wellman in your office at that time?

A. I don't recall now whether he was or not. I think probably he was, at one of the times anyway.

Q. Did you have several conversations with Mr. Noakes?

A. No, there was only one we had, but what I mean is, I made a couple of calls, one to Mt. Angel

(Testimony of Howard Eismann.)

to try to arrange warehouse space and another call to Mr. Noakes, but I don't remember whether Mr. Wellman was there when I made both calls or not. I remember he was there one time.

Q. Did you first call Mr. Noakes to see if that would be agreeable, if that date was agreeable with him? [354]

A. I do not recall, now, which call I made first. I remember both of them, but I do not remember which one was first.

Q. Did you at that time tell Mr. Wellman that you would inspect his hops but that, because of the sliding scale, the price would depend upon the official leaf-and-stem analysis?

A. I definitely did not.

Q. What was your reference to the leaf-and-stem analysis, then?

A. Just simply a matter as to whether or not hops were clean enough that they could be accepted by us under contract delivery.

Q. Did the Steiner corporation recognize this sliding scale in 1947?

A. We did, uniformly throughout.

Q. Did Steiner take delivery of the fuggles?

A. We did.

Q. Did Steiner, as a matter of fact, obtain all Mr. Wellman's fuggles?

A. Eventually, yes. However, I think that deal has been explained here. It was not any deal we

(Testimony of Howard Eismann.)

made with Mr. Wellman or Ray & Son or John I. Haas, Inc.

Q. Is it your practice not to permit growers to see the weight slips on their hops?

A. Ordinarily it is our practice not to give weight slips; I mean, this particular form which says "Hops Received" unless we are actually receiving the hops.

Q. That "Hops Received" slip was written up when Mr. Wellman's [355] clusters were inspected?

A. It was.

Q. On September 25th? A. Right.

Q. Do those slips show as the date received September 25, 1947? A. They do.

Q. Do those slips show that Steiner's half of Wellman's clusters were received by Mr. Kerr?

A. They do.

Q. Are the slips signed by Mr. Kerr?

A. Yes, just the word "Kerr."

Q. Do some of them say "Ray Kerr"?

A. I don't know. I was just looking at one here. Yes, some of them say "Ray Kerr."

Q. Is Mr. Kerr an inspector for Steiner?

A. He is.

Mr. Dougherty: Thank you, Mr. Eismann.

Mr. Kerr: That is all.

(Witness excused.) [356]

RONALD TROXEL

was thereupon produced as a witness on behalf of Defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Please state your name.

A. Ronald Troxel.

Q. Where do you live?

A. Salem, Oregon.

Q. What is your occupation?

A. Hop buyer.

Q. And were you a hop buyer in 1947?

A. Yes.

Q. Employed by A. J. Ray & Son in 1947?

A. Yes.

Q. Did you assist in weighing and inspecting and sampling of Mr. Wellman's late cluster hops in 1947, in behalf of A. J. Ray & Son?

A. I did.

Q. Who else was there at that time?

A. Mr. Noakes and Mr. Davis and Mr. Wellman.

Q. Do you recall when it was?

A. September 25th.

Q. At that time did you hear any conversation between Mr. Noakes and Mr. Wellman relative to the tenth-bale samples being sent [357] back to Washington, D. C.?

A. After we had finished, yes.

(Testimony of Ronald Troxel.)

Q. What was that conversation?

A. Well, Mr. Noakes refreshed Mr. Wellman's memory of the fact that the tenth-bale samples had to go East for Washington's approval and acceptance.

Q. Did Mr. Wellman say anything you heard at that time?

A. He remarked that that was satisfactory with him.

Q. Did you hear Mr. Noakes tell Mr. Wellman at that time he could not accept the hops, that the samples had to go back to Washington?

A. That is right.

Q. Is there anything else in that conversation that you now recall?

A. That was about all, because we were just ready to go home.

Q. When was that with relation to the taking of the tenth-bale samples?

A. That was after they were weighed and everything was finished.

Q. That was where?

A. In the Mt. Angel warehouse.

Q. Is that known as Schwab's warehouse?

A. Yes.

Mr. Kerr: That is all. [358]

Cross-Examination

By Mr. Dougherty:

Q. Mr. Troxel, you say that this conversation was after the hops had been weighed in?

(Testimony of Ronald Troxel.)

A. That is the first conversation of the kind I heard, yes.

Q. You were assisting Mr. Noakes in making the inspection? A. I was assisting him.

Q. Was that inspection made in the normal manner?

A. Under those conditions it was not; the inspection at least was normal but the prevailing conditions afterwards were not.

Q. Did you observe the Government inspector taking samples at that time? A. Yes.

Q. Was that done in the customary manner?

A. In the regular manner, yes.

Q. Before this conversation that you have testified about, were the bales marked on the head?

A. Just the warehouse mark and the Government stamp.

Q. Weren't they numbered on the head?

A. We numbered them on the head when we inspected them.

Q. This conversation you testified about was after they had been weighed in?

A. That was the first I had heard of it, yes.

Q. Mr. Noakes said the samples would have to be sent East, did he? [359] A. Yes.

Q. Is that where you ordinarily send these samples?

A. We send them to Hillsboro and they transfer them from there East with a bunch from Oregon.

(Testimony of Ronald Troxel.)

Q. Do you always send in these so-called inspection samples to Hillsboro? A. Always.

Q. So, sending them to Hillsboro was by no means uncommon, is that correct?

A. That is right.

Mr. Dougherty: Thank you.

Redirect Examination

By Mr. Kerr:

Q. Just a moment, please. Did you not at that time—that is, at the time you heard this conversation between Mr. Noakes and Mr. Wellman at the warehouse in Mt. Angel—did you not know at that time that A. J. Ray & Son could not then and there accept those hops? A. I did.

Q. You knew that by reason of what?

A. On our way over that morning Mr. Noakes told me that was the way they should be taken in.

Q. What did Mr. Noakes tell you in particular at that time?

A. He said he had instructions that we could not go ahead with [360] the crop, other than just inspecting them and weighing them and sampling them and numbering the bales, that we then had to submit inspection samples for approval of Washington, D. C.

Mr. Kerr: That is all.

(Witness excused.)

H. F. FRANKLIN

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please.

A. H. F. Franklin.

Q. Where do you live?

A. Springfield, Oregon.

Q. You have testified in another one of the series of cases upon trial before this Court?

A. Yes.

Q. At that time you stated your qualifications as a hop inspector? A. Yes, sir.

Q. Have you examined the samples of the Otto Wellman late cluster 1947 crop of hops which are marked Exhibit No. 11 in this case?

A. Yes, sir; I did. [361]

The Court: Is this your last witness?

Mr. Kerr: Our last witness, except for Mr. Haas who is coming from the East.

The Court: You may answer.

(Question read.)

Q. (By Mr. Kerr): State whether or not in your opinion those are samples of prime-quality hops? A. They are not.

Q. Why not?

A. They have considerable mildew damage and they are dirty picked.

(Testimony of H. F. Franklin.)

Q. How does the mildew damage show up?

A. There are some of those so-called nubbins that you refer to here in this other case, the Geschwill case. About half the cones show mildew damage, and then there is discoloration from mildew throughout the samples.

Q. Is that damage by mildew readily apparent from an examination of a sample?

A. Yes, it is.

Q. Is there any question in your mind about the presence of mildew damage? A. No.

Q. State whether or not the samples show freedom from damage by disease?

A. No, they do not. They show mildew damage.

Q. Were those hops well and cleanly picked, in your estimation, as that term is commonly used in the industry? A. No, they are not.

Q. Are they of even color? A. No.

Q. By reason of what?

A. Of mildew discoloration.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Do you have any personal knowledge of the 1947 hop crop in the Willamette Valley?

A. Just these three lots that I have examined in the courtroom is all.

Q. You have examined all these samples within the last few days?

(Testimony of H. F. Franklin.)

A. That is right, all of these.

Q. Do samples deteriorate over a period of a year and a half? A. Yes.

Q. Could you now say what the flavor of these hops was at the time they were fresh?

A. No, I couldn't.

Q. You have been here throughout these three cases, is that right? A. Yes, I have.

Mr. Dougherty: Thank you. [363]

Redirect Examination

By Mr. Kerr: .

Q. Are you now or have you ever been in the employ of John I. Haas, Inc.?

A. No, I have not.

Q. Have you ever been in the employ of A. J. Ray & Son? A. No.

Q. Have you ever been in the employ of Mr. Harold Ray? A. No, I have not.

Mr. Kerr: That is all.

(Witness excused.)

Mr. Kerr: That is all of the defendant's witnesses with the exception of Mr. Haas, who will arrive by plane late Friday night and be available for testimony on Saturday morning.

The Court: Any rebuttal?

Mr. Kester: Do you want us to put rebuttal on now before they close their case?

The Court: Yes. Proceed. [364]

Plaintiff's Rebuttal Testimony

O. L. WELLMAN

having been previously duly sworn, was recalled as a witness in his own behalf, in rebuttal, and was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. There has been some comment made about a lot of 64 bales or an estimate of 64 bales of a certain type. Will you explain what that situation was?

A. There was one little particular yard that we called the hill yard that were less affected by mildew than some of the others. It was the freest yard that I had and I thought maybe we could keep them separate from the rest of them. We found out later that we had to get considerable more pickers, and our baling crew at first just couldn't handle the hops as they were coming in and, therefore, we finally mixed them all with our late clusters.

Q. Did you at one time attempt to keep the hops from the hill yard separate from the others?

A. Yes, we attempted to, at the start, yes.

Q. At the time Mr. Davis took his samples that he mentioned in the kiln, were they at that time separate from the others?

A. Yes, they were at that time. That was early—I would say probably about the 2nd or 3rd of September.

(Testimony of O. L. Wellman.)

Q. Then, what was necessary to do with that particular lot? [365]

A. Well, they went in the storeroom and we finally—we had to put the other kilns on top of these.

Q. From that time on was it possible to keep these separate in the baling process?

A. It was impossible.

Q. At the time these hops were weighed in, both the fuggles and clusters, did any representative of John I. Haas, Inc., put any kind of branding mark on the fuggles, other than the number?

A. No, they were marked identical.

Q. Did they subsequently take and pay for the fuggles? A. Yes, they did.

Q. In prior years, in dealing with John I. Haas, Inc., on this same contract, had they customarily made a deduction in price for leaf-and-stem content when it was over 8 per cent?

A. Yes, I think they did in 1946—three-quarters of a cent per pound.

Q. Was that satisfactory, as far as you were concerned at that time? A. Yes, it was.

Q. There has been some testimony about why the full amount of the advances was not made at the time you were picking the clusters. Would you state what the fact is on that?

A. That was made at my request. Mr. Davis came out and offered the advances.

Q. About when was that? Tell us that, first. Was it during [366] the cluster picking?

(Testimony of O. L. Wellman.)

A. I think we just started on the clusters when he was there, and I told Mr. Davis that the crop was smaller than usual, than the average we had been growing, and that I had a matter of twenty or twenty-five thousand dollars in the bank at that time, and that I figured I did not need all the advances and asked him, if I did, whether it would be all right if I could come and get some more later on and he said, "You are perfectly free to call at any time you want additional advances."

Q. Was there anything said at that time about any picking advances because of the quality of your cluster crop, the quality of your cluster crop would be below the contract standard?

A. It was never mentioned.

Q. At that time was there mildew apparent in the yard? A. Yes, there was.

Q. Did you ever have any conversation with Mr. Noakes or anybody else representing John I. Haas, Inc., or A. J. Ray & Son—Did you ever have any conversation with any of them to the effect that the weigh-in of these hops and the inspection, taking of tenth-bale samples, would not be considered an acceptance, in accordance with the usual procedure?

A. No, it wasn't. The first I heard of it was in this court.

Q. About when was it that you left on the hunting trip that you mentioned here?

A. It was the 28th day of August. [367]

(Testimony of O. L. Wellman.)

Q. Of August?

A. Or of September. Could I look at these notes?

Q. Do you have a calendar?

A. Yes, I have a little calendar.

Q. All right. If that will be of any help, when did you first ask Mr. Noakes about taking in the clusters?

A. I asked him about taking in the clusters on September 11th, like in prior years. I said, "I would appreciate it very much, Mr. Noakes. You know, we always generally go on a hunting trip the 1st day of the season and I would appreciate it very much if we could finish this job and I could get this hop business off my mind so we can go on a real hunting trip," and Mr. Noakes told me he would be willing to do everything in his power to see that the job was done before we went hunting.

Q. You left on the 28th. About when did you come back from the hunting trip?

A. Left on the 28th, I think, and returned on Sunday, October 5th, in the evening at about 7:30 or 8:00 o'clock.

Q. After October 5th were you at home or around the vicinity at all times thereafter during that month?

A. In fact, on Monday evening our group that went hunting, we had a meeting at the locker plant at Mt. Angel where we divided up and cut up our venison, and it was on Tuesday morning or Wednes-

(Testimony of O. L. Wellman.)

day that I went to Mr. Noakes' office in Salem. I had promised Mr. Noakes if I was successful on my hunting trip I [368] would certainly bring him some venison, if we were lucky. I delivered this venison to Mr. Noakes' office on either Tuesday or Wednesday that week.

Q. That would be about what date? About the 8th?

A. The 7th or 8th of October.

Q. Was Mr. Noakes present then?

A. Yes, I delivered it to him personally.

Q. About the 7th or 8th of October?

A. The 7th or 8th of October.

Q. Was anything said at that time about the hop crop?

A. Yes. The leaf-and-stem content wasn't back at that time.

Q. And what was said about the leaf-and-stem analysis not being in?

A. He figured it should be through most any time.

Q. What was being held up awaiting the leaf-and-stem-content analysis?

A. The report from the inspection office in Salem.

Q. Did he indicate whether or not that was holding up the closing of the deal?

A. Yes, that was what was holding it up.

Q. After that time, between the 7th and 8th of October and the 28th of October, when they made

(Testimony of O. L. Wellman.)

payment on the 28th, between those two dates did you see Mr. Noakes again at any time?

A. I am not sure, but I think I seen him the following week, also in Salem, or at Mt. Angel, the following week. [369]

Q. Did he say anything at that time about your crop?

A. No, he hadn't heard anything more.

Q. On October 28th, when this payment was made, was anything said at that time about their refusing to take and pay for the clusters?

A. No, it wasn't mentioned on that date.

Q. Did you ask him at that time about it?

A. Yes, I did.

Q. What did you ask?

A. Before I took the check, I asked Mr. Noakes, I said, "Will this have any bearing on the settlement of the lates, paying for the lates?" And Mr. Noakes said, "Not whatsoever." He says, "In fact, I think it will help you," and I said, "I don't know—I don't want to take this check unless it is so understood." I said I would like to take this check down, before I cash it, and show it to Mr. Shields, which I did.

Q. What did he say then as to whether or not the taking of that check would or would not have any effect on the lates?

A. It was never mentioned. He didn't say that it would affect the lates by taking out all the advances out of the fuggles contract.

(Testimony of O. L. Wellman.)

Q. Did he at that time say anything about when they would or would not pay for the lates?

A. Well, he said, "The lates just haven't come through."

Q. There was testimony here that when you were talking to [370] Mr. Ray over in Hillsboro that you said Noakes had not led you to believe that the hops had been taken. Was there any such conversation; or what was the conversation, if any, on that point?

A. Of course, we had done a lot of visiting in Mr. Noakes' office and on that part it is kind of hard to remember, but to my knowledge at present I don't think it was mentioned.

Q. What is the fact as to whether or not Mr. Noakes did lead you to believe that the hops had been taken and would be paid for?

A. That is what I believed all the time, and he led me so to believe.

Q. There has been some statement about warehouse receipts. What is the practice in the hop trade; that is, what has been the usual practice with John I. Haas, Inc., as to when warehouse receipts are delivered to the buyer?

A. I think several times the sight draft calls for the warehouse receipt attached, and other times Mr. Noakes would call for the warehouse receipt when he wanted to pay me for some hops. He would tell me, "Now, bring the warehouse receipt along for such-and-such a lot of hops."

(Testimony of O. L. Wellman.)

Q. Has it ever been the practice to turn the warehouse receipt over until you have been actually paid for the hops?

A. I have never done it in all the years I have raised hops.

Q. Something was said about your having a fuggles warehouse [371] receipt with you when you came into Mr. Noakes' office on the 28th. Will you state what the situation was on that and how that happened?

A. The fuggles warehouse receipt was brought at the request of Mr. Noakes.

Q. When did he make that request and how?

A. Over the telephone, to our office.

Q. Do you recall whether he called you or whether you called him?

A. He said he had some money for me there and he would like to have me bring my warehouse receipt for the fuggles.

Q. Did you ask him at that time about the clusters? A. Over the telephone?

Q. Yes.

A. No, I didn't, because he didn't ask for the warehouse receipt on the lates at that time.

Q. What is the fact as to whether or not in your picking of the clusters you left any hops on the vines?

A. It would be safe to say I wasted more hops in 1947 than any year since I have grown hops—that is, as far as leaving them all through the yard.

(Testimony of O. L. Wellman.)

Q. How was that done? Was it by separate vines or by——

A. Separate vines and separate clusters and by lack of having the kind of pickers that we usually had.

Q. Did you make an honest attempt to pick only the better hops [372] out of the yard?

A. Well, just like I said before, we had four sections and I had four or five men that had charge of either one of these sections, men that had complete charge of the sections, and a general foreman for the yard, and they worked with all of the different sections and tried to do the best job that possibly could be obtained that year.

Q. How many pickers did you have to pick your yard, if you recall?

A. I think we had at one time around 400. We run through the yard that year, according to the compensation report, I think something like eleven or twelve hundred people through our yard, for the season of 1947.

Q. Eleven or twelve hundred people?

A. Eleven or twelve hundred different kinds of people.

Q. Did you have occasion to see the yard of Joe Serres that has been mentioned here?

A. Yes, I have.

Q. What is the fact as to the extent to which his yard was affected by mildew?

A. Joe Serres' place is a matter of about four

(Testimony of O. L. Wellman.)

miles from our farm, and Joe Serres and I have in times worked together in getting our jobs of work done at our yards, sending help back and forth, and at one time he helped me drain the entire yard. I think it was that spring or the year previous, either 1946 [373] or 1947, and we visited back and forth considerable and I went all through his yards several times, with Mr. Serres.

Q. What was the condition of mildew in his yard?

A. One yard was severely hit; in fact, it hit so hard he replanted his entire yard this year.

Q. Was the mildew condition in his yard better or worse than in yours?

A. It was like my worst yard that I had in the bottom.

Q. Did A. J. Ray & Son and John I. Haas, Inc., or any of their representatives at all times have access to all of your hops in the warehouse, to make as many inspections or take as many samples as they might want?

The Court: That has been covered many times.

A. Yes.

Q. (By Mr. Kester): Did you have any concern about what they did and what samples they took?

The Court: That has been covered.

A. No, had no concern at all.

Q. (By Mr. Kester): Did they, or any of them, at any time ever make any statement as to what they intended to do with the samples?

(Testimony of O. L. Wellman.)

A. You mean before——

Q. When was the first time anything was ever said about what they were intending to do with the samples?

A. I think it was sometime after I came back from hunting, when [374] I asked Mr. Noakes whether he had any information. He said, "Well, Otto, things have changed some since you went hunting. They have taken all the dealings out of our hands and before we can make any acceptance from now on it has got to come from our Eastern office." That was after I returned from my hunting trip.

Q. You said there had been a change. What had been their practice in the past?

A. I always dealt with Mr. Noakes right there at the Salem office.

Q. To your knowledge, has he always had authority to act on his own judgment?

A. I never dealt with anybody but Mr. Noakes and Mr. Davis.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. I think you stated at one time you had what you estimated to be about 64 bales of cluster hops which you had harvested from part of your yard which were comparatively free of mildew, is that right? What was the yard which you referred to?

A. It was what we call the hill yard.

(Testimony of O. L. Wellman.)

Q. You got about 64 bales of good hops off that yard, is that right?

A. I think—I couldn't say because we didn't bale them; couldn't say; that was just an estimate. We didn't have them [375] baled.

Q. How did these hops compare with the rest or with the others you harvested from the rest of the yard? Were they much better?

A. The yard was free all the way through, pretty well.

Q. Did you give any consideration, Mr. Wellman, to stopping your harvest when you got through harvesting the hill yard so that all your hops in these 64 bales would be free of mildew? Did you give any consideration to stopping?

A. Mr. Noakes and Gilbert Davis were down in the yard below the hop house; in fact, we walked all through; Mr. Davis went all through the yard on separate occasions when I wasn't with him. Mr. Noakes said there was certainly too many good hops; he wouldn't leave them.

Q. Did you give any consideration to stopping your harvest when you got the hops off the good yard? Did you think of stopping your harvest at that time?

A. We weren't harvesting any one particular yard at any time. We had different sections in different yards at different times.

Q. At one time you had what you estimated to be 64 bales of mildew-free hops in one hopper, is that right?

(Testimony of O. L. Wellman.)

A. I didn't have them all in there, no.

Q. You had them separate from the other hops, is that right? A. I started to.

Q. You gave no consideration—You did not even think of stopping harvesting? [376]

A. At that time?

Q. And not mix up any other hops with these good hops? A. Just couldn't be done.

Q. Why not?

A. How are you going to have four sections and have one kiln, when you have only one storeroom?

Q. Couldn't you have stopped harvesting and baled up the 64 bales and then go ahead?

A. Three or four days late——

Q. Couldn't you do that?

A. It couldn't be done.

Q. Explain why it could not be done?

A. You have four sections in four different yards.

Q. Yes. You did harvest the whole yard?

A. I was harvesting the whole yard, yes.

Q. You had 64 bales or the equivalent of 64 bales of good hops off that yard. Isn't that true?

A. There was more in that yard.

Q. I think you said that yard was practically free of mildew?

A. I said it didn't have as much mildew as the other yard.

Q. Did you give any consideration to keeping these hops separate and stopping all further har-

(Testimony of O. L. Wellman.)

vesting in order to avoid mixing these better hops with the bad ones?

A. I think I answered that question once.

Q. You are content with that answer at this time, is that right? A. Yes. [377]

Q. When was it you returned from the hunting trip? October 5th, you said?

A. Yes, on Sunday.

Q. Was that October 5th?

A. I think it was October 5th.

Q. How soon after that was it that Mr. Noakes told you the procedure had been changed and from then on samples had to be sent back to the Washington office for acceptance or rejection? How soon after that was that?

A. It was shortly after that. I couldn't remember the exact date.

Mr. Kerr: I think that is all. Thank you.

(Witness excused.) [378]

Mr. Kester: That is all the rebuttal we have at this time, your Honor, until we see what the rest of their case may develop.

The Court: What are you going to do about argument?

Mr. Kester: I assume it would not be very practical to try to argue it until the case is closed.

The Court: You have two other cases. You can argue those.

Mr. Kester: I would be glad to suit the Court's

convenience on it. My understanding now is that anything that may come out in this case may relate back to the others, in so far as it may have any bearing on the general situation, so I suppose it would be difficult to close any of them until they are all closed.

The Court: I think you had better argue the case beginning tomorrow morning.

Mr. Kester: We will be glad to comply.

The Court: Are you ready to do that?

Mr. Kerr: Yes.

The Court: Is there any evidence in the case about what the usual method of paying is, as to the time and where payment is made, and who makes it?

Mr. Kester: I think very possibly we could stipulate on that. My impression is—Correct me if I am wrong—that the usual practice is that payment is made by check or sight draft.

The Court: When?

Mr. Kester: At the time the warehouse receipt is delivered.

The Court: That still begs the question. Where is the warehouse [379] receipt delivered?

Mr. Kester: Well, they would wait until after the leaf-and-stem analysis had come in, because the price would depend on that, I suppose.

The Court: I think you had better put in some testimony on that. You can gather it up in the courtroom right now, some witness who will testify to that.

O. L. WELLMAN

plaintiff, having been previously duly sworn, was recalled as a witness on behalf of Plaintiff, and was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Wellman, is there any uniform practice in the hop business as to when hops are paid for?

A. It varies a lot with different concerns and sometimes on the conditions of different sales. I have sold hops and never have had to wait; when the job was completed, inspecting and weighing, they would give me my check right there. Sometimes the check would come out of the office; they sent them probably from their home office; the secretary or treasurer would send me a check.

The Court: You mean sometimes at the warehouse the field man would have a blank check and fill it out right there? [380]

A. Sometimes, yes.

The Court: Do you remember any case of their doing that?

A. Yes.

The Court: Go ahead.

Q. (By Mr. Kester): What is the custom as to whether or not payment waits for a determination of leaf-and-stem content?

A. That has delayed it some, when the OPA went in and they put hops under these OPA regulations and they enforced on the growers leaf-

(Testimony of O. L. Wellman.)

and-stem content at that time. Some years they got very far behind and we would just have to wait until they sent in the leaf-and-stem inspection certificate.

Q. After OPA went in, in 1944 or whenever it was, were you paid for your hops before the leaf-and-stem analysis had been made?

A. No.

Q. It always was after that?

A. Always after we had received the leaf-and-stem inspection certificate.

Q. In 1946, for example, do you recall about when you were paid?

A. Yes; I got a check from A. J. Ray & Son the 5th or 6th of November.

Q. What held it up that long?

A. The leaf-and-stem inspection. I think that was the date. I think they went through them a little later than they did in 1947. I don't know just what held it up, but I have got a record that shows I got paid for the 1946 crop in November of 1946. [381]

Q. After the leaf-and-stem analysis is in, is there anything else to hold up the making of payment, as far as you know, in the general practice?

A. No, there isn't.

Q. Then, when actual payment is made, what is the practice as to whether that is by check or draft or cash, or how it is handled?

A. It is mostly by check or draft, with the warehouse receipt attached.

(Testimony of O. L. Wellman.)

Q. Is it customary for a buyer at that time to prepare a statement or invoice showing computation of the deductions and so on?

A. They give you a tally sheet for the weights and then sometimes they are sent out of the Salem office or from some Portland office, or wherever their offices are—mostly out of one of their Oregon offices.

Q. Do they sometimes mail the checks to you rather than to deliver them in person?

A. Yes, they very often mail them to me.

The Court: You say you get local checks in final payment?

A. Yes, we have.

The Court: Locally?

A. We have had them from both places, from their office or the local representative, either one.

Q. (By Mr. Kester): If the office in Salem or somebody in Hillsboro, the Hillsboro office, might draw a check, would you have [382] any way of knowing where it came from?

A. No. We leave that up to the buyer.

The Court: Do you get checks from Washington or New York?

A. No, I don't.

The Court: You never have?

A. Never did.

Mr. Kester: Payment was always made through some branch of A. J. Ray & Son?

A. That is right.

(Testimony of O. L. Wellman.)

The Court: When you spoke of a warehouse receipt attached to a sight draft, wouldn't that draft be on the Washington office?

A. No, it would not. I had one out of Washington, a spot sale, and I turned it in to the bank and I told the bank to see that the check was good or that the money would be all right, that the check would be all right. That is the only deal I had outside, but that was a spot sale.

Q. (By Mr. Kester): At the time these various advances are made during the season, do you ever pay any attention to whether they were checks or drafts? Do you know the difference?

A. They were checks.

Q. Do you know who signed them?

A. Ray.

The Court: That has all been covered. [383]

Cross-Examination

By Mr. Kerr:

Q. Mr. Wellman, you requested specifically that the Government inspection of your late cluster hops be delayed until the tenth-bale samples were taken, and then made at the same time that the tenth-bale samples were taken?

A. No, I didn't request that.

Q. Didn't you request that the Government inspection not be made unless you were there?

A. Well, we done it in 1947 just like we did it in 1945 and 1946, because both the parties, Ray and S. S. Steiner, both parties wanted to be there

(Testimony of O. L. Wellman.)

when they took in them hops. The hops were split equally as they called out the numbers of the bales. They would have the inspector that took the leaf-and-stem content there on the same day. You couldn't hardly do that if you had a thousand bales; it would complicate matter so much more if the leaf-and-stem inspection was done separately.

Q. Ordinarily, the Government inspection is made sometime prior to the tenth-bale samples, or after the buyer's inspection?

A. Done with some small lots where the grower has one truckload or two truckloads, but where we put out anywhere from 90 to 150 bales on the warehouse floor it isn't. Sometimes they possibly get in a small lot and your State inspector isn't there; but where the warehouse floor is stacked with these bales, it just couldn't be done on these larger lots. [384]

Q. You say ordinarily the buyer has the Government leaf-and-stem certificate when he weighs in the hops?

A. The way I understand it, they will ask the State to make an inspection. In 1947 Mr. Eismann, in my presence, called the Department that day when we arranged for the use of that floor.

Q. What would you say as to the practice of other growers, other than yourself, or do you know?

A. I understood that is the way that was done with quite a few cases. It was done at the time of receiving or weighing-in.

(Testimony of O. L. Wellman.)

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. In this case the inspection was for the account of the buyer, was it not?

A. That is right. They requested the inspection.

Recross-Examination

By Mr. Kerr:

Q. Isn't that the case in connection with all contract hops? The inspection by the Government is for the account of the contract buyer?

A. Yes. They request the inspection.

Mr. Kerr: That is all. [385]

Redirect Examination

By Mr. Kester:

Q. The buyer then pays the inspection fee?

A. They pay the inspection fee, yes.

(Witness excused.)

Mr. Kester: That will be all.

The Court: Do you want to put on any testimony?

Mr. Kerr: Yes. [386]

Defendant's Surrebuttal Testimony

HAROLD W. RAY

having previously been duly sworn, was recalled as a witness on behalf of Defendant, in surrebuttal and was examined and testified as follows:

(Testimony of Harold W. Ray.)

Direct Examination

By Mr. Kerr:

Q. Mr. Ray, you have testified previously in this trial? A. Yes, I did.

Q. State whether or not payment for hops purchased by A. J. Ray & Son for John I. Haas, Inc., has ever been made to the grower directly from John I. Haas, Inc.?

A. That never has been, in the entire history of these dealings.

Q. How is payment handled?

A. Up to a number of years ago we bought with sight draft on A. J. Ray & Son, but for the past few years we have been paying by check entirely, A. J. Ray & Son's check. Mr. Noakes has authority to issue checks to growers in payment of their hops.

Q. As a general practice, how soon after A. J. Ray & Son accept hops for the account of John I. Haas, Inc., does A. J. Ray & Son pay the grower for those hops?

A. After the inspection certificate has been issued and we know what the analysis it, immediately a check is given to the grower, but in case the inspection certificate has not been received we are forced to wait until it has been issued so that we know how to pay. [387]

Q. When the inspection certificate is received, what is your practice with respect to paying the grower?

(Testimony of Harold W. Ray.)

A. We pay it just as promptly as we are able to get in touch with the grower. We pay as promptly and as fast as possible. Sometimes there is a little delay in getting in touch with the grower, for one reason or another.

Mr. Kerr: That is all.

(Witness excused.)

The Court: Mr. Kester and Mr. Dougherty, what effect, if any, are you going to concede in this case to the tenth-bale samples, in this case we have just finished? What is your theory about that?

Mr. Kester: I am not sure that I got your Honor's question. Of course, we take the position that there was no such an agreement, as is claimed by the defendant here, and in the ordinary practice weighing-in——

The Court: Listen. Take the other man's testimony as given. What is your position? They claim that the tenth-bale samples were a condition to acceptance. What is going to be your argument?

Mr. Kester: Of course, your Honor, we take the position in this case that there was no such an agreement. If the Court should hold that there was an agreement, that would make——

The Court: You just forget what I am going to hold. What [388] is going to be your answer to their theory?

Mr. Kester: I would say this, although I am not sure that I get exactly what your Honor is driv-

ing at. It is our understanding of these contracts that the contracts require the buyer to make an inspection and to act with reasonable diligence. I think in the trade that means to have someone at the warehouse who is prepared to accept the hops and who has authority to either accept or reject. There are a great many Oregon hop cases, as I understand it, which require that the buyer be prepared to either accept or reject. We feel they were under a duty to make an inspection with reasonable diligence.

The Court: Well, you mean you do not allow any time for the tenth-bale samples?

Mr. Kester: Ordinarily, as to the tenth-bale samples, the only question as to them is whether they correspond with the type samples. In other words, the buyer has had type samples in this case for over a month. The only question is whether the tryings which are talked about here correspond with the type sample which the buyer has previously had for inspection. If they do correspond, then the man on the job will weigh them in and, as they go over the scales, the practice, as we claim, is that they become the property of the buyer. The tenth-bale samples, as I understand it, are merely a means of giving the buyer samples which he can, in turn, use to sell to his [389] customers. We contend that the real question is that at the time of inspection whether the tryings correspond with the type samples the buyer previously has had.

The Court: Is there testimony in this case that will bear out what you have just said?

Mr. Kester: I am under the impression that there is, your Honor. If such testimony has not been introduced, we will be glad to go over it again, to be sure.

The Court: Do you want to say anything, Mr. Kerr?

Mr. Kerr: With respect to the tenth-bale samples, your Honor, I do not recall any evidence whatsoever to the effect that tenth-bale samples were taken merely for the purpose of providing the buyer with samples to show to customers. I do not know of any such evidence. We will certainly put in evidence to the contrary.

The Court: We will recess for ten or fifteen minutes, and then if either of you want to add anything to the record you may do so, and then at a later date we will hear this man from the East.

(Recess.)

Mr. Kester: We would like to call a couple of witnesses, your Honor, and before closing the case I would like to mention two things before I forget it.

In the event some amendment may become necessary, we would like that privilege. [390]

The other is, in connection with the hop book that Counsel produced yesterday, we are having photostats made today and we would like permission to offer those photostats when made.

Mr. Kerr: As to the photostats of the hop book,

I think they should be limited to Mr. Wellman's hops, the records pertaining to those hops. I believe for any other purpose they would be immaterial and we would object to their introduction in evidence, other than strictly relating to the Wellman hops.

The Court: When offered, I will rule.

RAY J. GLATT

having been previously duly sworn, was recalled as a witness on behalf of Plaintiff and was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Glatt, the question has been raised to what the customary procedure is on inspection in the warehouse. I wonder if you would explain to us, from a grower's standpoint, just what happens when hops are weighed and inspected at the warehouse, what the course of events is as to just what happens, under the usual custom and practice in the trade.

A. Before inspection of hops, of course, there are type samples [391] taken of the particular lot of hops, and that may be one or two or three samples. As the inspection is made, if there are no markings put on the bales, there are tenth-bale samples taken. These tenth-bale samples are compared with the type sample as well as the tryings.

Q. Assume the bales have been pulled down at the warehouse and have been lined up on the ware-

(Testimony of Ray J. Glatt.)

house floor, is there anything that is done to them in the inspection procedure? Do they take tryings the first thing?

A. Generally, tryings are taken first and tenth-bale samples are taken sometime after the tryings are taken and are not taken the same time while the tryings are being pulled, but I believe generally the tryings are taken first.

Q. When tryings are taken, that is about a handful of hops from each bale?

A. Yes, just about a handful of hops taken out of the side of the bale and placed on top of the bale, generally. These tryings are taken to the light and inspected and compared, of course, with the type sample that was taken originally.

Q. If there is anything wrong with the bale at that time, for instance if it is slack-dried or not dried, or if it has any mold from being in the warehouse, or if there is anything wrong with the bale, does that usually appear in the tryings that are taken?

A. Well, it might, yes, and of course it might appear also when [392] the tenth-bale sample is taken, but generally it should appear when the tryings are taken.

Q. If something appears to be wrong with the bale so that the buyer does not want to accept that bale, what is the practice as to whether or not that bale is weighed and numbered?

A. That bale generally is set out, and the buyer

(Testimony of Ray J. Glatt.)

would notify the grower that that bale would not be acceptable. Frankly, I haven't had that experience.

Q. But that is the usual practice?

A. Yes.

Q. Then, if he sets that bale out, is that bale thereafter weighed and numbered?

A. Well, if he rejects that particular bale, it is not weighed or numbered.

Q. It is not weighed or numbered if it is set out there? A. Correct.

Q. When tenth-bale samples are taken, is there an examination or comparison usually made?

A. Yes, the tenth-bale samples are examined or compared with the type samples that were taken originally.

Q. Is that for the purpose of determining that they are a fair representation of the lot, or what is the purpose of taking the tenth-bale samples, if any?

A. I assume the purpose of the tenth-bale samples is to determine as to whether or not the entire lot of hops runs true to the type [393] sample.

The Court: Are tenth-bale samples always taken?

A. As far as my experience is concerned, Judge, they are.

The Court: Where are they usually taken? At the warehouse?

(Testimony of Ray J. Glatt.)

A. At the warehouse, generally, after the tryings are taken from the bale.

The Court: What is done with them? Where do they go?

A. The buyer wraps them up and they are in his possession.

The Court: Do they go to New York or Washington or to Hillsboro, or where do they go, usually?

A. That is a question I could not answer, as a grower.

Q. (By Mr. Kester): From the standpoint of the grower, does he know or care what the buyer does with the tenth-bale samples?

A. As a grower myself, it is immaterial to me what he does with the tenth-bale samples.

The Court: What is the difference between tenth-bale samples and tryings? Just in quantity?

A. Tryings is drawn from the side of the bale, just a small handful of hops, customarily taken from the side of the bale.

The Court: The difference, then, is only in quantity?

A. Yes. It is all the same hops. It is a difference in quantities.

The Court: Why, if you have tryings of each bale, do you need tenth-bale samples, also?

A. I assume a buyer could answer that better than I can, Judge, [394] but it gives the buyer a

(Testimony of Ray J. Glatt.)

better chance to make a thorough inspection of the hops.

The Court: Goes into the bale deeper?

A. And takes a larger amount, yes. I assume that they can be used for the sale of those hops to the final consumer.

Q. (By Mr. Kester): Is it a fact that the tool with which the tryings are taken is long enough so that the tryings can be taken out of any part of the bale that the inspector wants to?

A. That is correct.

The Court: Had you ever known of a case prior to 1947 when acceptance was conditioned on the tenth-bale samples having been found satisfactory?

A. Not as far as my experience is concerned.

Q. (By Mr. Kester): What is the fact as to whether or not a tenth-bale sample, taken in the warehouse, at the time of inspection, is broken open or split, or is it kept intact in its original form?

A. It is generally kept intact, as far as my experience is concerned.

Q. Then it would be wrapped up in the same form and shape as when it came out of the bale, is that right? A. That is correct.

Q. After it has been wrapped up, the grower does not know thereafter what happens to it?

A. No, I think not. [395]

Q. I think you may have mentioned it before, but how long have you been growing hops?

(Testimony of Ray J. Glatt.)

A. Oh, about twenty years.

The Court: Are tenth-bale samples always taken at the time of inspection?

A. As far as my experience is concerned, they have been.

Q. (By Mr. Kester): Let me ask this: Are tenth-bale samples always taken out of every tenth bale numerically, or do they sometimes select them at random?

A. Sometimes they take them numerically and sometimes they are taken at random so they would get tenth-bale samples out of the entire lot.

Q. Is the taking of these tenth-bale samples a normal part of the inspection routine?

A. It is, yes.

Q. What is the usual practice as to whether or not, when a bale is run over the scales, it is considered that bale has been accepted by the buyer?

The Court: Don't get into a lot more trouble. I just wanted to hear about these tenth-bale samples. Don't open the case up again. We have been trying these cases now for six or seven days, it seems.

Mr. Kester: May I inquire if what has been brought out now answers what the Court has in mind?

The Court: I will answer that when I decide the case. [396]

Mr. Kester: Very well.

(Testimony of Ray J. Glatt.)

Cross-Examination

By Mr. Kerr:

Q. You say the purpose of the tenth-bale samples is to assist the buyer in determining whether or not the hops are of a particular grade, quality or condition?

A. That has been my impression, yes. It is a part of the inspection.

Q. Tryings are taken ordinarily from each and every bale, are they not? A. That is correct.

Q. Whereas tenth-bale samples are drawn only from every tenth bale? A. That is correct.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. In the usual practice when does the buyer normally make his decision as to whether or not the bales are of the quality desired?

A. It is made after the tenth-bale samples are taken and after the tryings are taken from that particular lot of hops.

Q. Is it made before they go over the scales?

A. I assume it is. It is taken for granted when the tryings [397] are taken and the tenth-bale samples are taken and the hops usually are weighed in, providing there is an agreement before all of this procedure that the hops are acceptable.

Q. You say "providing there is an agreement." What do you mean?

A. I mean that there is an understanding between the buyer and the seller that the hops are

(Testimony of Ray J. Glatt.)

going to be sold for a certain price, and that price will be determined upon the type samples that were taken previously.

Q. In other words, if the price has been agreed upon? A. Yes.

Mr. Kester: I think that is all.

Recross-Examination

By Mr. Kerr:

Q. Then you say it is a matter of intention between the parties as to when the hops have been accepted; the two parties must have agreed if there is acceptance? A. That is correct.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. What you are saying is what happens in the usual course of business, the practice in the trade as to what is acceptance in [398] the usual course, is that right? A. I think that is correct.

(Witness excused.)

Mr. Kester: I might say I was prepared to call another witness to confirm this, your Honor.

The Court: Put him on if you want to.

Mr. Kester: My only point is I believe the statute requires two witnesses to prove custom. If Counsel will agree that if I call another one he would say the same thing, that will have been taken care of.

The Court: You had better do just what you think you need to do.

KILLIAN W. SMITH

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kester:

Q. Mr. Smith, I do not believe you have testified previously in this case as you have in the other case? A. Yes, that is right.

Q. Would you state what is the usual practice in the business, or what is done at the time the hops are weighed and inspected [399] at the warehouse?

A. At the time the hops are inspected at the warehouse they are lined up, and the inspector tries each bale with a trier to determine whether they are in sound condition, whether they are dry, dried right, or whether there is any mold or any particular thing wrong with them. Then he puts these tryings on top of the bale and if the bales are all okeh he will take tenth-bale samples to confirm the fact that these tryings are the same as those tenth-bale samples. He will compare them together to make sure that the tryings and the tenth-bale samples represent the lot of hops at the time of the taking of the lot of hops. If he does not throw a bale or two out for some reason or other, he will number the bales, then, and weigh them in. After they are weighed in, the grower, if he has all his papers, if he has his certificate, his State

(Testimony of Killian W. Smith.)

certificate, and his warehouse receipt and all the other necessary things, settlement is made then, usually.

Q. If he does not have his inspection certificate, is settlement held up until he gets that?

A. That is right.

Q. Are tenth-bale samples always taken at that time? A. Yes.

Q. At that time do they always have type samples that have been previously taken for comparison?

A. Not always. Previously, during the war, while I was working [400] for Mr. Seavey, not in all cases did I take initial type samples; but if we did, he would give me the okeh from that type sample to go ahead and take in the lot. Of course, the lot would have to run uniform to that and the tenth-bale samples would bear that out. You also find, in taking tenth-bale samples, that you get down deeper into the bale and get a bigger portion, and also determine whether there may be some slack-dried hops or something materially defective.

Q. If something is found wrong with one bale, on examining the tryings and, as you say, it is set out, is that bale counted in the determination of the tenth-bale samples to be taken?

A. Usually not. Sometimes they don't take tenth-bale samples; that is, of each tenth bale. They might take seven out of a hundred or out of any number. Generally if a bale is set out it is the

(Testimony of Killian W. Smith.)

grower's property again and he can either take it home and re-dry it, if it is otherwise acceptable, or work it over and bring it back for later acceptance. Then it is counted in the entire lot if it comes in and passes inspection.

Q. If for any reason one is set out and not taken at that time, is that bale weighed and numbered at that time?

A. No, usually don't do that because it might spoil the chance of a sale. These bales that are set out, they usually never put a mark on them because they are the grower's property, and if he re-dries them and works them over and puts them in marketable shape, he may sell them to some other dealer but, if there is [401] any marking on them, it might spoil the sale.

Q. If a bale is set out, as you say, and not accepted, does the buyer have any concern with how much it weighs? A. No.

Q. After tenth-bale samples are taken, what is ordinarily done with those?

A. Those are usually sent to the East—well, they are always sent in to the office and, after they reach the office, why, they are usually sent to the ultimate consumer or, if the buyer is acting for an Eastern broker, they are sent to him and he makes his disposition of them, probably to the trade or to the consumer or maybe he just keeps them there to represent the whole lot of hops.

Q. From the standpoint of the grower, does he

(Testimony of Killian W. Smith.)

know or care what the buyer does with those tenth-bale samples?

A. No, sir; that is never of any particular concern to the grower. In fact, they don't like to have you take too many samples because they don't usually get paid for those, because the hops are weighed after the samples are taken.

Q. How much does each sample weigh?

A. From a pound to a pound and a half.

Q. Is the burlap wrapping cut or damaged when one of these samples is taken?

A. Yes, the burlap is cut back about a foot and it is opened at the seam, in an angular shape. After the sample is drawn and [402] trimmed up, why, the trimmings go back into this hole that the sample is pulled out of and then the hole is sewed up by the inspector.

Q. So it is apparent when you look at the bale whether or not samples have been taken in that manner?

A. Oh, yes.

Q. What is the fact as to whether or not the fact that samples are taken out of the bales has any effect on a subsequent sale?

A. Well, it is always noticed by a buyer or inspector, and he usually asks or he finds out for himself by use of his trier.

Q. What is the ordinary practice in the business about making acceptance of a lot of hops dependent upon approval of the tenth-bale samples or the taking of tenth-bale samples?

(Testimony of Killian W. Smith.)

A. Not while I was buying hops.

Q. Over how many years have you been in the hop business?

A. I have raised hops for nine years and I worked for Mr. Seavey for not quite four years.

Q. In working for Mr. Seavey, you were a buyer or commission man, I think you said?

A. I was a commission man and inspector. I didn't inspect all the hops but inspected only what I was told to by Mr. Seavey; and if I was told by Mr. Seavey to pay him, I would do it, and sometimes if all the papers were available, if the grower had them at that time, he would issue a sight draft, and the sight draft must have the warehouse receipt attached to it when it [403] goes through the bank.

Mr. Kester: I think that is all.

Cross-Examination

By Mr. Kerr:

Q. When hops are not under contract and are offered for sale as spot hops, they usually have many samples taken from them, do they not?

A. Some lots do and some don't.

Q. Would you say that the taking of tenth-bale samples by the buyer is always for the purpose of determining their grade, quality and condition of the hops?

A. They are usually taken to bear out the fact that they conform to the tryings and are an indica-

(Testimony of Killian W. Smith.)

tion that the whole lot of hops is represented by the tenth-bale samples, yes.

Q. In other words, you agree the practice of the tenth-bale samples is to determine the grade, quality and condition of the lot?

A. That is right.

Q. Do you remember Jock Lawson?

A. I have heard of him.

Q. A buyer of hops? A. Yes.

Q. Do you remember that his practice was to send tenth-sale samples back to the Eastern office?

A. I don't know how he conducted his particular business.

Q. Do you remember an occasion when he took and sent such tenth-bale samples back and the lot was rejected because of the resin content of those hops? A. No.

Mr. Kerr: That is all.

Redirect Examination

By Mr. Kester:

Q. You say the purpose of tenth-bale samples is for determining the grade, quality and condition. Is it to determine that for the information of the buyer or so he can communicate with anyone?

A. I don't quite get that question.

Q. When you say that tenth-bale samples are taken for the purpose of determining grade, quality and condition of the hops, is to tell the particular buyer at that time of the condition, or is it so he can have samples that tell his buyers what the con-

(Testimony of Killian W. Smith.)

dition of those hops is, or both? What is the fact?

A. Well, if those samples don't bring out the true representation of the lot, why, they are usually rejected right there.

Q. Did you know Jock Lawson?

A. It has been a great number of years ago. By that I mean fifteen or twenty or twenty-five years ago.

Mr. Kester: I think that is all.

(Witness excused.) [405]

Defendant's Additional Testimony

HAROLD W. RAY

a witness on behalf of Defendant, having previously been duly sworn, was recalled and was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. You have testified in this case previously, have you not? A. I did.

Q. Your name is Harold W. Ray?

A. Harold W. Ray.

Q. Is it customary in the hop trade for a buyer to take tenth-bale samples of a lot that he has under contract to purchase? A. It is, yes.

Q. What is the purpose of taking the tenth-bale samples?

(Testimony of Harold W. Ray.)

A. To assist in the determination of the quality and condition of the hops.

Q. State whether or not such tenth-bale samples are taken customarily for the purpose of providing the buyer with samples to furnish to breweries or other customers?

A. I think not. The real purpose is in drawing the tryings, a handful out of each bale, in so doing the hops are quite badly broken up and you would be unable to definitely determine the condition of the hops as to their wholeness and flaky condition. We leave that to the full-sized tenth-bale samples, and it is a part of the process of determining the quality and condition of [406] the hops.

Q. Reference has been made by testimony introduced by the plaintiff about the practice or alleged practice of buyers accepting hops on the basis of tenth-bale samples, acceptance being made at the time the samples are drawn. State what your practice has been with respect to that?

A. It has been our custom, prior to 1947—prior to that time it was our custom, with the exception of some extenuating cases, that John I. Haas, Inc., would advise us whether or not they were willing to accept on the basis of the type sample. In other words, if, in our opinion, the hops equalled the type sample, they would or would not accept, and it was up to A. J. Ray & Son or their inspectors, in case they said they would accept on type samples, to determine whether or not the entire lot of hops ran equal to those type samples.

(Testimony of Harold W. Ray.)

Q. Under those circumstances did you use tenth-bale samples for the purpose of determining the grade, quality and condition?

A. We used those tenth-bale samples at the time of inspection in determining whether or not the hops were—what the quality and condition of the hops were and whether or not they were equal to the type sample.

Q. What was the practice in 1947?

A. In 1947 we were not permitted to pass upon the quality of the hops and John I. Haas, Inc., for the most part, would not determine whether or not they would accept on the basis of type [407] samples only, and instructed us that they must have tenth-bale inspection samples to correctly and accurately represent the hops, before they would determine whether or not they would accept them on the contracts.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Ordinarily, in taking tenth-bale samples, do you exercise great care to be sure that they do correspond to your previous type samples?

A. We don't do that, Mr. Dougherty. We take care that these tenth-bale samples accurately represent the quality in the lot of hops.

Q. The purpose, then, is to be sure that these samples are representative of that particular lot of hops?

A. Correct. That is true.

(Testimony of Harold W. Ray.)

Q. Is it the established custom for you to send tenth-bale samples forward to John I. Haas, Inc., in Washington, D. C.?

A. A split of the tenth-bale samples, it has been our custom; and we would retain the other portion of the samples in our office.

Q. Do you know whether or not John I. Haas then may, in certain cases, use those samples and exhibit them to their customers?

A. I think that is not the usual custom, Mr. Dougherty. I think [408] I can say I have never known of cases where we submitted or drew tenth-bale samples to be delivered to the ultimate purchaser or to the brewery, but just what they do with them I cannot tell you.

Q. Is the taking of tenth-bale samples a normally established part of the inspection routine?

A. Yes, it is.

Mr. Dougherty: Thank you.

(Witness excused.) [409]

Mr. Hill: I have here, your Honor, an amended answer which conforms to the amended answer I requested permission to file several days ago. I have served a copy upon counsel.

The Court: It may be filed.

(Thereupon an adjournment was taken until 10:00 o'clock a.m. the following day, February 3, 1949.) [410]

10:00 o'Clock A.M., February 3, 1949

Mr. Kester: Before we begin the argument, your

Honor, we have now obtained photostats of the 1947 portion of Mr. Ray's hop book, and we have had them marked as Exhibit 17. We will offer them in evidence.

Mr. Kerr: We have no objection to the receipt in evidence of such portions of these records as relate directly to the Wellman account.

I believe, in examining the photostat sheets, that only one of the sheets referred to by Counsel covers the Wellman account and therefore I suggest that the offer be limited to that one sheet.

The other sheets relate to accounts having no connection with the Wellman account and, therefore, we submit they are irrelevant and are not applicable to the issues in this case at all, and we therefore object to the introduction in evidence of any portion of this material except Sheets 8 and 9 or Pages 8 and 9, the last on which refers to the Wellman fuggles, and of course we ask that the exhibit be limited in its use in this case to that particular entry.

Mr. Kester: I certainly do not consent that our offer be limited in that manner. It is our view that this entire book, in so far as it pertains to that year, is highly important, [411] relevant and material for a number of reasons.

In the first place, the defendant himself has brought into the case the subject of contracts with other growers, and, if for no other reason, it is relevant because of that situation. The defendant himself has brought it into the case. There has

been a great deal of evidence here as to how A. J. Ray & Son acted with other growers, how their buyers acted with other growers. There is correspondence in the case between A. J. Ray & Son relating to other growers' transactions. They have offered evidence as to agreements that they entered into with other growers and with respect to handling contracts of a similar nature with other growers. All of that has come into the case and, certainly, we are entitled to these records being complete and introduced in the evidence of this trial.

In the second place, there are some very important admissions of fact in these documents pertaining to the construction of this contract as a type contract, as shown by the conduct of A. J. Ray & Son in interpreting this contract themselves. For example, Mr. Ray testified with respect to what they customarily took in under other contracts as hops being cleanly picked. There is evidence here that they took 12 per cent, 13 per cent, 14 per cent picks of other growers, so long as the price was low, and shipped the hops to breweries. Certainly that is a very important admission with respect to Mr. Ray's testimony as to how he construed and applied these [412] contracts, so it is our view that this whole subject as to how Haas and Ray interpreted, as a practical matter, the type of contract that we are here concerned with, in their dealings not only with Wellman but with other growers, because of the fact that this is the same type of contract—it is our view that is

very important in establishing what this contract was actually meant to be between the parties and how it was construed in the trade during 1947.

The Court: Admitted, subject to the objection.

(Photostatic copy of records of John I. Haas, Inc., covering hop purchases and sales, thereupon received in evidence and marked Plaintiff's Exhibit No. 17.)

(Argument of Counsel.)

(Thereupon the above-entitled cause was continued until Saturday, February 5, 1949, at 10:00 o'clock a.m.) [413]

10:00 o'Clock A. M., Saturday, February 5, 1949.

FREDERICK J. HAAS

was thereupon produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Kerr:

Q. Will you state your name, please?

A. Frederick J. Haas.

Q. Where do you reside?

A. Washington, D.C.

Q. What is your occupation?

A. Principally in the hop business.

Q. What is your connection with the defendant in this case, John I. Haas, Inc.?

A. The defendant in the case—my connection with the defendant in the case?

(Testimony of Frederick J. Haas.)

Q. Yes.

A. I am Vice-President of the company.

Q. How long have you been connected with the corporation? A. Since 1926.

Q. Where do you maintain your office?

A. In the Metropolitan Bank Building in Washington, D.C.

Q. Is that the main office of the corporation?

A. That is our main office, yes.

Q. You are a son of John I. Haas, are you not?

A. That is correct.

Q. State how long John I. Haas, Inc., has been in the hop business as a dealer?

A. Since 1916.

Q. Will you state the area over which it buys and sells hops?

A. We buy hops in the United States and grow hops in the United States and Canada, and sell hops in the United States, Canada, Mexico, South America, and, before the war, in the European countries, also in the Far East wherever possible.

Q. The corporation also owns hopyards, does it?

A. That is correct.

Q. They are located where?

A. In the States of Washington, California and Oregon.

Q. How many yards does it own and operate in Oregon?

A. Well, there are three separate and distinct farms in Oregon.

(Testimony of Frederick J. Haas.)

Q. In what areas are they located?

A. The Independence-Salem area.

Q. Do you perform any duties with respect to the operation of these yards?

A. I do.

Q. What are those duties?

A. I am in charge of the production of these farms.

Q. Including the Oregon farms? [415]

A. In a supervisory capacity. Yes, including the Oregon farms.

Q. Were you in Oregon in September, 1947?

A. I was.

Q. At that time did you see samples of the Otto Wellman late clusters, 1947 crop of hops?

A. Yes, sir; I did.

Q. Where did you see them?

A. I saw those in Mr. Ray's office.

Q. Do you now recall those samples?

A. Yes, I do. I recall and I have refreshed my mind since.

Q. State the quality, grade and condition of the samples which you at that time saw?

A. Well, the samples I first saw in Mr. Ray's office, when he showed them to me I thought they were very poor. They were reddish color and the picking did not appear to be very good.

Q. Did they show any damage by mildew?

A. Yes, they did.

Q. How did that damage appear?

(Testimony of Frederick J. Haas.)

A. In little red nubbins throughout the hops and red petals on some of the whole hops.

Q. State whether or not such samples were of prime-quality hops, as that term is used in the trade? A. No, they were not.

Q. Why not? [416]

A. Well, because prime-quality hops are always considered even-colored hops and cleanly picked, whereas these hops were not in that specification.

Q. Is freedom from damage by mildew one of the requirements of prime quality? A. Yes.

Q. Were these particular hops free from damage from mildew?

A. No, by physical examination it was quite obvious they were not.

Q. Did you also see the tenth-bale samples of these 1947 cluster crop of hops which were sent to the Washington office of John I. Haas, Inc.?

A. Yes, I saw those later in Washington, D.C.

Q. Did you examine them personally?

A. I did.

Q. State whether or not in your opinion those hops were of prime quality?

A. No, they were not.

Q. Why not?

A. Because of damage by disease, that obviously being mildew, and because of the poor picking.

Q. State whether or not the damage by mildew that you have referred to was a substantial damage? A. Very. It was very substantial.

(Testimony of Frederick J. Haas.)

Q. Do you know why the Otto Wellman 1947 crop of late cluster [417] hops were rejected by your firm? A. Yes, I do.

Q. State the reason?

A. The principal reason was because they were not up to quality, the quality standards required under the contract, and they were not free from disease such as the specifications called for in the contract, and they were not cleanly picked.

Q. The evidence shows, Mr. Haas, that according to the official State Inspection Certificate the cluster hops were analyzed at 11 per cent leaf-and-stem content.

State whether or not such percentage of such content is considered in the hop trade as cleanly picked hops? A. No, it is not; certainly not by the breweries who use them.

Q. Is it considered a cleanly picked hop by dealers? A. Not by us.

Q. Was the rejection of the Wellman late cluster hops, 1947, motivated in any degree by the market price then prevailing for cluster hops?

A. Absolutely not, because we rejected many hops that were of lower prices that we had under contract because of the same deficiency.

Q. Did the rejection of such late cluster hops by your firm in 1947 make it necessary for your firm to go out and replace those hops at the prevailing market price?

A. It certainly did. [418]

(Testimony of Frederick J. Haas.)

Q. Have you any notations as to quantities?

A. I have. I have brought some figures with me which I could give you.

Q. Where did you get those figures?

A. From the records in our office.

Q. Will you state those figures to the Court, please?

A. Well, the 1947 crop, your Honor, we rejected in Oregon a total of 1,036 bales at 85 cents a pound because of the quality deficiency, a total of 318 bales which we had under contract at 45 cents per pound; a total of 330 bales which we had under contract at 60 cents a pound and hops which we had under contract at 85 cents a pound and at 50 cents a pound.

We accepted in Oregon on contract 4,886 bales of 1947 clusters which we had on order, on contract with growers, at between 80 and 90 cents per pound. We purchased a quantity, a total quantity of 4,886 bales.

At the same time, in order to replace rejections, we bought, between September 2nd and November 11, 1947, a total of 1,265 bales on the open market at a price of 85 cents per pound, with the exception of two small lots which we bought at 80 cents a pound. Those were used to replace hops which were rejected. We had to fly them in in order to make our deliveries.

Q. At the time you were in Oregon in September, 1947, did you have any discussion with Mr.

(Testimony of Frederick J. Haas.)

Harold Ray of A. J. Ray & Son, about inspecting, taking samples, and weighing of growers' hops [419] in Oregon? A. Yes, I did.

Q. Will you state the nature of those conversations?

A. Well, we instructed Mr. Ray or his office to take tenth-bale samples out of these various lots, with the understanding that the tenth-bale samples were purely for inspection purposes and that the weighing was in no manner to constitute delivery, because we did not know the quality of these hops until we examined them and the weighing was principally, as I understand it, a matter of convenience to the grower and to the person who was doing the weighing.

Q. Will you explain a little more what you mean by the weighing? Was it a matter of convenience to the parties?

A. I believe there was some limitation on these contracts, when they were supposed to be taken in, and, since there were quite a few contracts to be taken in, Mr. Ray said they naturally had to get around and do the best they could, to try to do all this work in a limited space of time.

Consequently, if the lot had only been inspected at that time and not weighed, it would have meant that the inspection staff would have had to go back to that particular lot to do the weighing, whereas in this way they could get it all done on the same trip.

(Testimony of Frederick J. Haas.)

Q. That is to say, if you had merely taken tenth-bale samples and then inspected the hops later on the basis of those samples, [420] and they had been accepted by your Washington office, it would have been necessary to then go back and weigh the hops, is that right?

A. Of course. That is exactly it.

Q. Did you have any conversation with Mr. Ray during your September visit in Oregon concerning getting an agreement or understanding from each grower that such tenth-bale sampling and inspection would not constitute acceptance of the hops? A. We did.

Q. What was the nature of those conversations?

A. Well, we told Mr. Ray—for the sake of convenience, it was mutually agreed between him and our office that this was a very convenient method to do that, but told him under no circumstances was this to constitute an acceptance of the hops, but merely the weighing of them.

Q. In rejecting the Wellman cluster hops, was it the intent or purpose of your firm to beat the grower down on his price? A. Certainly not.

Q. Did you give any instructions to A. J. Ray & Son on the subject?

A. Of how he should handle his contracts, you mean?

Q. On the subject of handling hops of doubtful quality? A. We did.

Mr. Kerr: If the Court please, Mr. Ray this morning referred me for the first time to a letter

(Testimony of Frederick J. Haas.)

addressed to A. J. Ray & Son, [421] Inc., under date of September 16, 1947, from John I. Haas, Inc., which bears on this subject, containing instructions to A. J. Ray & Son concerning the handling of these hops.

The Court: You may put it in.

Mr. Kerr: I knew nothing of this letter until Mr. Haas, rather than Mr. Ray, called my attention to it.

The Court: Put it in.

(Letter dated September 16, 1947, John I. Haas, Inc., to A. J. Ray & Son, marked Defendant's Exhibit No. 18.)

Mr. Kerr: Mr. Ray got this letter out of the file, your Honor. Mr. Ray has asked me to explain to your Honor he had not mentioned it previously to me or produced it in response to Plaintiff's counsel's request in this case, because it does not refer to Mr. Wellman specifically and he did not understand that it might have a bearing on the case.

Q. Mr. Haas, there has been handed to you a letter which has been marked Exhibit 18. Will you state whether or not that includes the instructions that you have just referred to?

A. Just a moment, please. Yes, this is the paragraph I was referring to here in the letter.

Q. That letter is of what date?

A. September 16, 1947.

Q. Addressed by your firm to A. J. Ray & Son, Inc.?

A. That is correct. [422]

(Testimony of Frederick J. Haas.)

Q. Will you read the paragraph of that letter that you are referring to, or that you referred to previously?

A. The paragraph reads: "The only thing we see to do is not to make settlement with these cluster growers until you have had the lots analyzed for picking and also sent in a line of samples so that we can judge whether or not the hops can be taken over by us and delivered to brewers. In fact, we believe we will have to submit many more samples of Oregons to brewers this year than usual because of the quality, as we are certain to have rejections if we ship this red stuff to brewers without giving them advance notice."

There is another paragraph, but I guess that is not pertinent.

Q. Is there any further reference to the general instructions that you refer to there?

A. Yes. "It is true that we need all of the hops we can get, but in the case of some of the larger growers where a part of their crops is trashy we may have to take the better part of the crops and reject the balance, which of course we are fully entitled to do under the contracts. On this poor, trashy stuff it will not be a case of trying to get the grower down in price, but will be a case of simply not being able to use the hops at any price."

Q. State whether or not the portions of the letter you have just read accurately and truly

(Testimony of Frederick J. Haas.)

describe the attitude and conclusions [423] of your firm as of the date of that letter?

A. I think it does, and I think our operations confirm that.

Q. To your knowledge, were prime-quality hops produced in Oregon in 1947?

A. Yes, they were.

Q. To your knowledge, were prime-quality late cluster hops produced in Oregon in 1947?

A. Very few.

Q. Does the term, or the standard, rather, of quality expressed by the term "prime quality" vary from year to year?

A. Not in our opinion, it does not. I don't think it does.

Q. Does "prime quality" as that term is used in the hop trade mean the average quality of merchantable hops produced in a particular year in a particular area?

A. Oh, no.

Q. Would such a standard be practicable?

A. Not by the standards under which we sell to the brewing trade.

Q. What is the effect of the standards imposed upon you by the brewers?

A. Will you please repeat that question? What is that?

Q. Does the brewing trade fix standards of hops in the hop trade?

A. Definitely, because they are the ones that are the consumers. We do not use the hops. [424]

(Testimony of Frederick J. Haas.)

Q. State whether or not the definition of contract quality included in your contracts with growers for Oregon hops sets forth the standards generally applied by the brewing trade in buying hops from dealers? A. I believe it does.

Q. What is the purpose of taking tenth-bale samples in connection with the inspection of growers' contract lots?

A. Well, the purpose is to get an average run of the quality of the lot.

Q. Are those samples sent back to Washington, to the Washington office, also used by your office in representing those hops to prospective customers?

A. That is correct. We inspect them and then we send them out to brewers to whom we submit them on contract.

Q. Are sales to brewers based upon samples?

A. In most cases, yes.

Q. Has John I. Haas, Inc., ever authorized A. J. Ray & Son, Inc., to waive any provision of the written contract between John I. Haas, Inc., and Otto Wellman covering Otto Wellman's 1947 crop of late clusters?

A. Not to my knowledge, no.

Q. Has it ever authorized Mr. Ray to waive any provision of that contract?

A. Definitely not.

Q. Has it ever authorized Mr. Noakes to waive such contract [425] provisions? A. No.

(Testimony of Frederick J. Haas.)

Q. Has it ever authorized anyone else, to your knowledge? A. Certainly not.

Q. Has it ever authorized anyone else, to your knowledge, to waive the contract? A. No.

Q. Has it ever authorized anyone, to your knowledge, to change the provisions of the written contract referred to? A. No, certainly not.

Q. To your knowledge, has John I. Haas, Inc., ever authorized anyone to accept any of Mr. Wellman's late cluster hops, 1947 crop of hops?

A. No, not to my knowledge.

Q. Has John I. Haas, Inc., ever been sued before in Oregon?

A. Not to my knowledge, never.

Q. Has it ever been sued anyplace by a grower?

A. No, we have never been sued.

Q. This is the first time that John I. Haas, Inc.,—

A. To my knowledge.

Q. —to your knowledge, that John I. Haas, Inc., has been sued by a grower, is that right?

A. That is correct.

Q. Do you know whether or not hops sold by your firm to brewers are sold on the basis of chemical analyses? [426]

A. Never. We have never sold a bale of hops to anyone on the basis of a chemical analysis.

Q. Have you ever bought any hops from any grower based on a chemical analysis?

A. No, we have never done that either.

(Testimony of Frederick J. Haas.)

Q. It has been brought out in this trial, Mr. Haas, that some of the poor quality hops will move in channels of trade. Do you know where they go?

A. No, I don't, but the fact remains that they do move in channels of trade because of someone else, somebody else buying them, because they are gotten rid of some way.

Q. Do they move, to your knowledge, at the full market price for prime-quality hops?

A. I doubt that.

Q. Do you know whether or not there has been any export of such poor quality 1947 Oregon crop hops?

A. Yes. In fact, we exported some few poor quality 1947 crop ourselves.

Q. Why do you export them rather than keep them for domestic use, for the domestic market?

A. I can tell you the reason for that. A great many of the export people are very particular, but some are not too particular. Some are always willing to buy at a lower price.

Q. Then the poorer quality hops are not moved at the higher prices, is that right? [427]

A. They certainly do not.

Mr. Kerr: That is all.

Cross-Examination

By Mr. Dougherty:

Q. Were you in Oregon in August, 1947, at one time?

A. I was, I think, in and out at least once and possibly more than once.

(Testimony of Frederick J. Haas.)

Q. Did you look at your corporation's yards in Oregon at that time? A. Yes, we did.

Q. Was there any mildew in them at all?

A. There was some, yes.

Q. Is Mitoma one of your yards?

A. That is correct.

Q. Would you say 10-per cent picking was a cleanly picked hop? A. 10 per cent?

Q. Yes. A. That is only fair.

Q. Did you handle any of your own hops from your own yards that showed 10-per cent picking in 1947?

A. I honestly do not recall the picking standards of our own hops, but I can hardly believe they were as high as 10 per cent.

Q. In order to refresh your memory on it, I might invite your attention to Lot 250 of 186 bales of clusters from the Mitoma [428] farm, showing a picking of 10 per cent.

Mr. Kerr: Is that my copy?

Mr. Dougherty: It is shown in the copy that I have here.

Mr. Kerr: What is the page?

Mr. Dougherty: Page 2 or, rather, it is the second sheet, Pages 4 and 5.

Q. Were those hops disposed of to breweries?

A. I imagine they were. I don't know exactly, but they certainly were disposed of; certainly.

Q. Those hops showed some mildew, did they?

A. I distinctly recall the instructions that Mr.

(Testimony of Frederick J. Haas.)

Ray and I gave to our manager that he was to very carefully screen the picking at the Mitoma ranch. In other words, he was to leave everything that was red and he should very carefully screen out only the green stuff, and that of course accounted for the very low yield per acre that we had that year, and I distinctly remember about the Mitoma farm that we did not have as much downy mildew as many others.

Q. But they did show some downy mildew?

A. Very little.

Q. Are you acquainted with the Riverside Farm?

A. Yes, I am.

Q. Who operates it? A. Mr. Ray.

Q. Would you consider 12-per cent hops cleanly picked hops? [429]

A. Not too clean, no.

Q. With reference to the same exhibit, on the third sheet, Pages 6 and 7, I would like to invite your attention to the top of that page and ask you whether or not that shows that some 12-per cent picking from the Riverside Farm was disposed of to brewers?

A. I am not positive. Of course, there were plenty of Riverside hops accepted. There were also a number of Riverside hops rejected.

Q. Following the fourth line where it shows 12-per cent picking on a lot of 99 bales—follow that line across, please.

A. The fourth line, you say?

Q. The fourth line, 12-per cent picking.

(Testimony of Frederick J. Haas.)

A. 99. Yes, I have got it.

Q. Does that indicate that those dirty picked hops were disposed of to a domestic brewery?

A. Definitely.

Q. Was there any mildew on the Riverside Farm in 1947?

A. There was some, yes.

Q. As a matter of fact, do I understand correctly that some of it was so bad you never were able to dispose of it?

A. They were never accepted.

Q. Never accepted?

A. No. In other words, we rejected them.

Q. Turn to the last page of that exhibit, Mr. Haas, the last entry. [430] Does that indicate that in May, 1948, you purchased hops from the Riverside Farm which showed 11- and 12-per cent picking?

A. That is correct; it does.

Q. Does that indicate that those hops went to a domestic brewery?

A. Yes, they did.

Q. I believe you said the standards were set by the brewing trade. Do you sell to breweries on a printed contract similar to these growers' hop contracts?

A. Yes. Well, it is not similar. It is a grower's contract each year—I mean a contract between the dealer and the brewery which specifies the quantity and price, and certain quality specifications.

Q. What are those quality specifications?

A. The quality specifications to the breweries

(Testimony of Frederick J. Haas.)

are generally classified as "choice," "fancy" or "standard." We generally specify in all our contracts either "choice" or "fancy," and through trade custom the term "choice" seems to embody all of these features that are written into the growers' contracts.

Q. Is there any recognized standard, for example, governmental standard, or definition of the term "choice"?

A. I don't believe so.

Q. Do your sales contracts further contain a lengthy definition of "choice" brewing hop similar to the definition in the growers' hop contracts?

A. No. They do have a reference that they shall be free from disease.

Q. As I understand it, most of your sales to breweries are on the basis of samples?

A. A great many, and some are not; but the brewery of course always reserves the right to reject hops if they are not according to the quality specifications of the contract, which are generally embodied in the term "choice" or "fancy."

Q. But if the sale is on sample, the only guarantee is that they will run according to sample?

A. Subject to approval of the sample, yes. I might add that brewers are getting much more particular.

Q. Mr. Haas, I believe you used the term "choice." A. Yes.

Q. Do I understand most of your growers' contracts are so-called prime-quality contracts?

(Testimony of Frederick J. Haas.)

A. Well, prime quality, you mean——

Q. Yes, prime quality.

A. No, I don't think the term is used by any contract—prime quality? If it is, I don't recall it.

Q. Quoting from the contract: "The said hops shall be of prime quality——"

A. Well, it is used. I am sorry. I had forgotten.

Q. Then, do I understand that hops which are purchased under the label "prime quality" are resold under the label of "choice [432] quality"? Is that correct?

A. Apparently the brewer considers those standards choice. In other words——

Q. Do I understand that "choice" hops are the best type of hops that you sell?

A. Well, I think the quality specifications designated as "fancy" are probably a little better.

Q. The figures which you gave us, Mr. Haas, concerning rejected and accepted hops, do they relate entirely to Oregon?

A. No, they do not because we were unable to buy sufficient quantities in Oregon because we did not have the proper quality available. That is, I am referring now to the 1947 crop, the purchase figures stated, accepted in Oregon on contract, which naturally referred only to Oregon.

Q. But the so-called replacement of 1,265 bales——

A. That is right.

Q. ——that includes all your purchases for that period of time?

(Testimony of Frederick J. Haas.)

A. For those two months, that is correct.

Q. Both inside and outside of Oregon?

A. That is correct.

Q. The accepted figure of 4,886 bales at 80 to 90 cents—How many bales did you accept at a lower price?

A. I do not have that figure here.

Q. Would you say it was a considerable number of bales? [433]

A. I would say offhand—possibly Mr. Ray has that figure in his head, but I would say offhand it was considerably less than that.

Q. Would you say that figure would be in hundreds or possibly a couple of thousand or something like that?

A. Probably a few thousand; oh, yes, several thousand.

Q. With reference to the letter which Counsel produced this morning, do you still have that?

A. I think I have it right here, yes.

Q. What is the date of that letter?

A. September 16, 1947.

Q. September 16? A. Yes.

Q. Do I understand that your two requirements in that letter were to have the hops inspected for picking and also to send a line of samples, is that correct?

A. That is correct, to inspect them for picking and for mildew damage.

Q. What do you consider to be a line of samples?

(Testimony of Frederick J. Haas.)

A. Well, tenth-bale samples is the accepted practice.

Q. Doesn't that term "line of samples" refer to so-called type *type* samples?

A. No, I don't believe so. The type sample, according to our understanding, always is possibly two samples out of a big lot, but a line of samples is a full, representative line. [434]

Q. Do I understand you cannot properly pass on a large lot of hops just from one or two type samples?

A. It is certainly very difficult.

Q. Does that letter say anything at all about weighing-in not constituting an acceptance?

A. What do you mean? Wait a moment. I will look and see. I do not believe this letter does, but I believe that was instructed to Mr. Ray in other correspondence and telegrams.

Q. You mentioned, I believe, Mr. Haas, Mr. Ray had been instructed about weighing-in not being an acceptance. Is this telegram, Exhibit No. 5, the telegram to which you are referring?

A. That is certainly one of them. There might be others, but this certainly covers part of that.

Q. That is the telegram of September 25th?

A. That is what it is dated, yes.

Q. I would like to ask you now about your understanding of those instructions. Suppose a grower had not agreed to this, would Mr. Ray have been

(Testimony of Frederick J. Haas.)

authorized to go ahead and accept his hops anyway?

A. No, I would say not.

Q. Suppose the grower had not agreed to that, would Mr. Ray have been authorized to go ahead and inspect the hops and weigh them in?

A. Well, on the understanding that the grower—with the understanding with the grower, I mean, that the weighing-in did [435] not constitute acceptance.

Q. Suppose the grower had refused to so understand?

A. I don't know what would have happened then. It was supposed to have been understood—always made clear to the grower; supposed that these instructions were imparted to the grower in each case.

Q. Yes. You consider these to be instructions to the grower rather than an agreement with him?

A. No. Well, it depends on how you interpret the word "instruction." The instructions were to Mr. Ray's office and from there on the arrangements were with him and the grower.

Q. Suppose the grower had declined to enter into such an arrangement?

A. I think it would have been very unreasonable of him to decline to do so, because you cannot inspect a lot by simply having one or two type samples and, while in past years there were certain allowances made then and things were handled a little

(Testimony of Frederick J. Haas.)

bit on an easier basis, however, when, as everyone notice, in 1947 the entire Oregon crop was in peril—that is, the late cluster varieties—it was certainly reasonable that a full line of inspection samples be submitted before anyone was even expected to buy those hops for his hop trade.

Q. This was a change from the practice in prior years, is that correct?

A. To some extent, yes; and then, of course, also you had [436] another feature entering into it. Up until 1947 there was no such thing, except in rare cases, as a question of premium or penalty on hop picking. Unless you had a full line of inspection samples, which the Federal inspection service takes themselves, you are unable to determine what the pick is of a particular lot. You can't determine that from one or two samples.

Q. Let us assume, however, a grower would be so unreasonable as not to agree to this arrangement, then what should Mr. Ray have done?

A. I don't know. Of course, that did not arise.

Q. Would he have been authorized to inspect and weigh in the hops anyway?

A. Well, he certainly would not.

Q. With reference to Exhibit 3-U, do you recognize Mr. Rauber's signature?

A. Yes, sir; I do.

Q. Who is Mr. Rauber?

A. Mr. Rauber is vice-president and secretary of the corporation.

(Testimony of Frederick J. Haas.)

Q. In that letter he assigns, apparently, as one of the grounds for rejecting Mr. Wellman's clusters the fact that there are grain restrictions on breweries. What does that refer to?

A. May I read that?

Q. Please do.

A. Well, I think I know what this means. As you probably recall, during 1947 the brewing industry was still working on a grain-restriction [437] program, which was an aftermath of the war, and, as a consequence, they just were not able to sell as much beer as they had a demand for and, consequently, they had to be more particular on the quality of their materials. Naturally, if they had a tremendous supply on their hands and they could fill the orders, they would be willing to relax possibly some of their quality standards, which I suppose goes on in almost any industry from time to time, but when they were so closely curtailed and their sales were limited they naturally wanted only the best and insisted on sticking absolutely to the letter of the law as far as contract specifications were concerned. I think that is what Mr. Rauber refers to in this letter.

Q. I understand in 1947 you disposed of mildewed hops of 11, 12, 13 and 14 per cent pick to breweries?

A. I don't believe that we did.

Q. Haven't you noticed here where some of the Mitoma and Riverside pickings were that high?

(Testimony of Frederick J. Haas.)

A. Well——

Mr. Kerr: I do not think he said they were mildewed hops. I don't recall that.

Q. (By Mr. Dougherty): Did those hops contain any mildew? A. The Mitoma hops?

Q. Yes.

A. Very little. As I explained, I think they were hand-picked, but it is only natural you are going to have a bale or two [428] with mildew, but they were absolutely hand-screened, the Mitoma hops.

Q. How did it happen, Mr. Haas, that the picking was so high, if they were so carefully picked?

A. They were 10 per cent—I don't know. I don't know.

Q. Did the Riverside hops have any mildew?

A. They had some, but, as I say, we rejected a good portion of the Riverside hops because of mildew damage.

Q. Those hops that ran 10 or 12 per cent that you disposed of to breweries, is it your understanding brewers' standards are less rigid than those of any other?

A. You can't base it on the basis of grain restrictions only, but I do think if they have an enormous demand the natural tendency is to relax their standards, which is also reflected in the quality of the beer.

Mr. Dougherty: Thank you, Mr. Haas.

(Testimony of Frederick J. Haas.)

Redirect Examination

By Mr. Kerr:

Q. Has your firm noted any reluctance on the part of brewery customers to accept diseased hops?

A. I should say so.

Q. What has been the general reaction of your customers to hops diseased by mildew?

A. They just won't take them. They just turn the samples [439] down when we send them to them.

Q. Was there any scarcity of Oregon mildew-free hops produced in 1947?

A. There certainly was.

Q. And what was the effect of that scarcity of mildew-free hops upon the willingness of buyers to relax picking standards?

A. Well, that was obvious, because if you had a combination of both, that is, poor picking and mildew damage, you had two strikes on you, so to speak, whereas if only one of those factors was present, naturally, you had a fifty per cent better chance to induce a brewery to take them. If they were present in combination, they were more or less hopeless.

Q. Which defect did the brewers consider more serious, the diseased condition of the hop by reason of mildew or the dirty picking?

A. I just would not care to answer that, Mr. Kerr. I don't know.

Q. You don't know which they consider more serious?

(Testimony of Frederick J. Haas.)

A. Oh, the more serious? I would say possibly the mildew damage, but I wouldn't care to qualify as an expert. I would rather have the brewery speak for themselves.

Q. Do you know whether or not some breweries employ machinery or make tests as to the leaf and stem content of the hop?

A. They do, definitely. I know that.

Q. You referred to purchases made by John I. Haas, Inc. in [440] 1947 to replace hops which had been or were to be rejected. Did you read the particular purchases and prices you referred to?

A. I think only in total.

Q. Will you read the purchases you referred to in toto, the purchases of 1947 cluster hops, to replace the hops that were being rejected?

A. You want me to read this?

Q. If you will, please.

Mr. Kester: You have a memorandum there. Why don't you put it in?

Mr. Kerr: You may put it in, if you like.

A. I would have to explain these. 174 bales in California—You want me to read the prices, too?

Q. If you would, please.

A. 174 bales in California, at 80; 16 bales in Oregon, at 85; 90 bales Yakima hops, 80; 99 bales, Oregon hops, 85; 116 bales Oregon hops, 85; 140 bales California hops, 86; 30 bales California hops, 85; and 600 bales Oregon hops, 85.

Q. Were those cluster hops?

(Testimony of Frederick J. Haas.)

A. They were all Oregon clusters.

Q. The California hops——

A. They were all clusters—they are all clusters, as you know, in California, and Yakima, too.

Q. In reference to the hypothetical question which counsel [441] propounded to you in which you were asked to assume that the weighing in of a grower's hops would not be an acceptance—under that situation, if Mr. Ray had reported to you to that effect would you have been willing or would your firm have been willing to authorize Mr. Ray to take tenth-bale samples of the hops, if agreeable to the grower, but not to weigh them?

A. Yes. Yes, I think we would.

Q. If the grower would have permitted you to take tenth-bale samples without that being an acceptance, do you think your firm would have been agreeable to that, without going ahead and weighing them?

A. Will you state that again, please?

Q. In other words, if the grower had agreed that you could take tenth-bale samples——

A. Yes.

Q. ——without that sampling being an acceptance——

A. Yes.

Q. ——then, you think you would have authorized Mr. Ray to take those tenth-bale samples but to defer the weighing, if that right?

A. That is right.

Mr. Kerr: That is all. [442]

(Testimony of Frederick J. Haas.)

Recross-Examination

By Mr. Dougherty:

Q. Isn't it the common practice of your firm to take type samples of a grower's hops?

A. Oh, yes.

Q. Do growers ordinarily limit you to the number of those?

A. I don't believe so, but I believe there are generally only one or two taken, just to give you an indication of the quality, because if you don't take one or two you might as well take the regular line.

I might add something, that we have changed that and we are currently, as for example this past season in Yakima where they had as you know wind damage there to hops—we stamp on all of our weight sheets that it does not constitute acceptance of the hops; in cases where we don't stamp that on, we just make it clear to the grower.

Q. That was a change incorporated in 1948?

A. Yes, because of the fact that is the first time they ever had any red hops in Yakima, whereas in Oregon the first time that happened was in 1947, within our memory.

Q. Is there anything which limits John I. Haas, Inc. to taking only one or two type samples?

A. I don't believe so. I will tell you—Mr. Ray's inspection department would know more about that than I would.

Q. Would it be true to say that, so far as you know, there is [443] no reason why type samples

(Testimony of Frederick J. Haas.)

cannot be taken from every tenth-bale? Would that be correct?

A. Type samples? Well, they are not known as type samples any more, then. They are known as inspection samples.

Mr. Dougherty: Yes.

Redirect Examination

By Mr. Kerr:

Q. Isn't it a fact that type samples usually are taken even before the hops have been baled?

A. Very often.

Mr. Kerr. That is all.

(Witness excused.)

Mr. Kerr. I believe that is all, your Honor. I might say we appreciate the opportunity of putting Mr. Haas on now, and we appreciate the courtesy of counsel in agreeing to it.

(Testimony closed.) [444]

[Title of District Court and Cause.]

REPORTERS' CERTIFICATE

We, Ira G. Holcomb and John S. Beckwith, Official Reporters of the above-entitled court, do hereby certify that on, to wit, January 28, January 29, February 1, February 2, February 3 and February 5, 1949, we reported in shorthand the testimony and proceedings upon the trial of the above-entitled

matter; that we thereafter caused our shorthand notes to be reduced to typewriting under our direction; and that the foregoing transcript, consisting of pages numbered 1 to 444, inclusive, constitutes a true, full and accurate transcript of said proceedings so taken by us in shorthand on said dates, and of the whole thereof.

Dated at Portland, Oregon this 15th day of November, A.D., 1949.

/s/ JOHN S. BECKWITH,
Official Reporter.

/s/ IRA G. HOLCOMB,
Official Reporter. [445]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Defendant's motion for more definite statement, Amended answer, Memorandum of decision—Judge McColloch, Findings of fact and conclusions of law, Judgment, Notice of appeal, Supersedeas bond, Order extending time for filing record on appeal and docketing appeal, Statement of points on which defendant intends to rely on appeal, Designation of contents of record on appeal,

Order for transmittal of exhibits, Appellee's designation of additional contents of record on appeal, Order extending time for filing record on appeal and docketing appeal, Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 4158, O. L. Wellman vs. John I. Haas, Inc., in which John I. Haas, Inc. is appellant and O. L. Wellman is appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there is enclosed herewith duplicate transcript of proceedings, January 28, 29, 1949 and February 1, 2, 3, 5, 1949, filed in this office in this cause, together with exhibits 1, 1a, 2, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 3h, 3i, 3j, 3k, 3l, 3m, 3n, 3o, 3p, 3q, 3r, 3s, 3t, 3u, 3v, 3w, 3x, 3y, 3z, 4 to 10, 12 to 18.

I further certify that the cost of filing the notice of appeal, \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of December, 1949.

LOWELL MUNDORFF,

Clerk.

[Seal] By /s/ F. L. BUCK,

Chief Deputy.

[Endorsed]: No. 12442. United States Court of Appeals for the Ninth Circuit. John I. Haas, Inc., a corporation, Appellant, vs. O. L. Wellman, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed December 28, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12442

JOHN I. HAAS, INC., a corporation,
Appellant,

vs.

O. L. WELLMAN,
Appellee.

DESIGNATION OF THE PORTIONS OF THE
RECORD WHICH APPELLANT THINKS
NECESSARY FOR CONSIDERATION OF
POINTS TO BE RELIED UPON

The appellant, John I. Haas, Inc., hereby designates for inclusion in the printed record on appeal the following portions of the record, proceedings, and evidence:

1. Complaint. (Transcript, Document No. 1.)

2. Amended answer. (Transcript, Document No. 3.)

3. Findings of fact and conclusions of law. (Transcript, Document No. 5.)

4. Memorandum of decision. (Transcript, Document No. 4.)

5. Judgment. (Transcript, Document No. 6.)

6. Notice of appeal. (Transcript, Document No. 7.)

7. Supersedeas bond. (Transcript, Document No. 8.)

8. Order extending time for filing record on appeal and docketing appeal, entered November 18, 1949. (Transcript, Document No. 9.)

9. Statement of points on which defendant intends to rely on appeal. (Transcript, Document No. 10.)

10. Designation of contents of record on appeal, filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 11.)

11. Complete typewritten transcript of the proceedings and testimony before the court at the trial of this case. (Transcript, Document No. .)

12. Order for transmittal of exhibits. (Transcript, Document No. 12.)

13. Order extending time for filing record on appeal and docketing appeal. (Transcript, Document No. 14.)

14. Transcript of docket entries. (Transcript, Document No. 15.)

15. Clerk's certificate of transcript. (Transcript, Document No. 16.)

16. This designation of the portions of the record which appellant thinks necessary for consideration of points to be relied upon.

17. The following exhibits:

(The following designation of exhibits is to be disregarded if an order is entered by the court pursuant to the stipulation filed contemporaneously herewith.)

(a) Plaintiff's exhibits having the following numbers: 1, 1-A, 2, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-Y, 4, 5, 6, 7, 8, 9, 10, 16.

(b) Defendant's exhibits having the following numbers: 12, 13, 14, 15, 18.

18. Stipulation with respect to printing of exhibits.

19. Order which may be entered pursuant to such stipulation.

Dated this 21st day of December, 1949.

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Designation of the Portions of the Record which Appellant Thinks Necessary for Consideration of Points to Be Relied Upon, and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANT INTENDS TO
RELY ON APPEAL

The appellant hereby adopts the statement of points upon which it intends to rely on appeal, which was filed with the Clerk of the United States District Court for the District of Oregon. (Transcript, Document No. 10.)

Dated this 21st day of December, 1949.

KERR & HILL,
/s/ ROBERT M. KERR,
/s/ STUART W. HILL,
Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Concise Statement of the Points on Which Appellant Intends to Rely on Appeal and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated December 21, 1949.

STUART W. HILL,
Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 28, 1949.

[Title of Court of Appeals and Cause.]

STIPULATION WITH RESPECT
TO PRINTING OF EXHIBITS

Whereas, there are in this cause a substantial number of documentary exhibits (including letters, telegrams, and other records) which would be very expensive to print or otherwise reproduce; and,

Whereas, the appeal involves factual issues, and each party on brief and in argument will wish to refer to certain of said documentary exhibits;

It Is Hereby Stipulated, subject to the approval of the court, that an order may be entered on this appeal permitting all of said documentary exhibits

to be considered by the court in their original form without the necessity of printing or otherwise reproducing the same.

The exhibits to which this stipulation refers have the following numbers:

(a) Plaintiff's exhibits: 1, 1-A, 2, 3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, 3-I, 3-J, 3-K, 3-L, 3-M, 3-N, 3-O, 3-P, 3-Q, 3-R, 3-S, 3-T, 3-U, 3-V, 3-W, 3-X, 3-Y, 3-Z, 4, 5, 6, 7, 8, 9, 10, 16, 17.

(b) Defendant's exhibits: 12, 13, 14, 15, 18.

Dated this 21st day of December, 1949.

/s/ STUART W. HILL,

Of Attorneys for Appellant.

/s/ WILLIAM E. DOUGHERTY,

Of Attorneys for Appellee.

So Ordered:

WILLIAM DENMAN,

Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,

United States Circuit Judge.

[Endorsed]: Filed Dec. 30, 1949.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF THE RECORD CONSIDERED MATERIAL ON THE APPEAL

The appellee, O. L. Wellman, having been served

with appellant's designation of certain portions of the record, hereby designates the following additional parts of the record which appellee thinks material to the consideration of the appeal:

1. Appellee's designation of additional contents of record on appeal. (Transcript, Document No. 13.)

2. Plaintiff's Exhibits 3-X, 3-Z and 17. (The printing of exhibits is subject, however, to such order as the Court may enter in connection with the stipulation, heretofore filed, relating to the consideration of the exhibits in their original form.)

3. The proceedings and evidence (including the transcript of testimony and the exhibits) contained in the records now before this Court on appeal from the judgments of the United States District Court for the District of Oregon in the cases of *Hugo V. Loewi, Inc., Appellant, vs. Fred Geschwill, Appellee*, No. 12440, and *Hugo V. Loewi, Appellant, vs. Kilian W. Smith, Appellee*, No. 12441, which two civil actions were tried in the District Court jointly with this action. (The printing in this case of the records in those cases is subject, however, to such order as the Court may enter with respect to appellee's motion referred to in the next paragraph below.)

4. Appellee's motion for consolidation of the record in this case with the records on appeal in the two cases named in the preceding paragraph, which motion is filed contemporaneously herewith.

5. Such order as the Court may enter with respect to appellee's motion referred to in paragraph 4 above.

6. This designation of additional parts of the record considered material on appeal.

Dated this 30th day of December, 1949.

/s/ ROY SHIELDS,
/s/ RANDALL B. KESTER,
/s/ WILLIAM E. DOUGHERTY,
MAGUIRE, SHIELDS,
MORRISON & BAILEY,
Attorneys for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 3, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR CONSOLIDATION
OF RECORDS

Now comes the appellee, O. L. Wellman, and moves the Court to consolidate, for the purposes of this appeal, the record in this case with the records now before the Court in the contemporaneously appealed cases of Hugo V. Loewi, Inc., Appellant, vs. Fred Geschwill, Appellee, No. 12440, and Hugo V. Loewi, Inc., Appellant, vs. Kilian W. Smith, Appellee, No. 12441, to the extent that (a) the evidence, exhibits and proceedings contained

in the records on appeal in said other two cases may be considered as a part of the record in this case, and (b) any part of the evidence, exhibits or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case.

In support of the foregoing motion the appellee respectfully shows the Court:

1. All three cases are civil actions which involve common questions of law and fact.

2. The three cases were tried jointly in the District Court. There is one combined record for all three cases to this extent: The parties consented and the District Court ordered that the evidence in any of the three actions should be deemed to have been taken and heard and should be considered in each of the actions so tried together insofar as such evidence was pertinent, material and relevant.

3. Appellant's designations of record in the three cases undertook to divide such combined record into three distinct and separate parts. By appellee's cross-designations the part of the combined record below contained in each of the records on appeal has been included in the record on appeal in the other cases. It would, however, be very expensive, and we think unnecessary, to print again in this case the portions of the combined record which will be printed and will be before the Court in said other two cases.

4. Appellant's statement filed herein indicates that twenty-nine of the fifty-one points upon which appellant intends to rely (being Points 1 through 29) relate to the District Court's findings of fact. In order to meet appellant's contentions on such factual issues in this case it will be necessary for appellee to refer in part to evidence which is material and relevant to this case, and which appears in the combined record, but which under appellant's designation would be printed or otherwise available for consideration only by reference to the record in another of said cases.

5. Appellant's statement filed herein indicates that eight of the points upon which appellant intends to rely (being Points 44 through 51) relate to asserted errors in admitting evidence during the trial in the above-mentioned case of Hugo V. Loewi, Inc., Appellant vs. Fred Geschwill, Appellee. In order to permit consideration of such issues, appellee deems it necessary to have the record in that case before the Court in this case.

6. The Federal Rules of Civil Procedure, whenever applicable, have been adopted as part of the Rules of this Court with respect to appeals in actions, such as these, of a civil nature. Rule 42(a) of the Federal Rules of Civil Procedure provides:

“(a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it

may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.”

It is submitted that the foregoing rule is applicable here, and that the granting of appellee’s motion together with the like motions filed in said other two cases would, within the intent and purpose of that rule, facilitate the Court’s consideration of each of the three cases, and also avoid unnecessary costs.

The foregoing statements of fact are based upon the records before the Court, and are also verified by the affidavit appended hereto.

Subject to the approval of the Court, the appellee submits the foregoing motion without oral argument, unless a hearing be requested by the appellant.

Respectfully submitted,

/s/ ROY SHIELDS,

/s/ RANDALL B. KESTER,

/s/ WILLIAM B. DOUGHERTY,

MAGUIRE, SHIELDS,

MORRISON & BAILEY,

Attorneys for Appellee.

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, William E. Dougherty, being first duly sworn, do depose and say that I am one of the attorneys of record for appellee in the within-entitled case, that I have knowledge of the facts, and that the statements made in support of the foregoing motion are true as I verily believe.

/s/ WILLIAM E. DOUGHERTY.

Subscribed and sworn to before me this 30th day of December, 1949.

[Seal] /s/ MARIAN HUGGINS,
Notary Public for Oregon.

My Commission expires March 13, 1951.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

U.S. Circuit Judges.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 4, 1950.

[Title of Court of Appeals and Cause.]

ANSWER TO MOTION FOR CONSOLIDATION
OF RECORDS

Now comes the appellant, John I. Haas, Inc., a corporation, and files this Answer to the Motion for Consolidation of Records heretofore filed on behalf of the appellee. We consent on behalf of the appellant that the evidence, exhibits, and proceedings contained in the records on appeal in said other two cases may be considered as a part of the record in this case, so far as pertinent, and that any part of the evidence, exhibits, or proceedings which may be printed in said other two cases may be considered in this case without the necessity of printing the same again for this case, so far as pertinent.

In support of this Answer, we rely upon the portion of the Transcript of Proceedings in the case of Hugo V. Loewi, Inc., a Corporation, Appellant, v. Fred Geschwill, Appellee, a portion of which is set forth in the Answer to Motion for Consolidation of Records filed in that case contemporaneously herewith.

Respectfully submitted,

KERR & HILL,

/s/ ROBERT M. KERR,

/s/ STUART W. HILL,

Attorneys for Appellant.

State of Oregon,
County of Multnomah—ss.

I, Stuart W. Hill, being first duly sworn, depose and say that I am one of the attorneys of record for appellant in the within-entitled case, that I have knowledge of the facts, and that the statements made in support of the foregoing Answer are true as I verily believe.

/s/ STUART W. HILL.

Subscribed and sworn to before me this 7th day of January, 1950.

[Seal] /s/ GERALDINE RIST,
Notary Public for Oregon.

My Commission Expires May 22, 1953.

State of Oregon,
County of Multnomah—ss.

I hereby certify that I have prepared the foregoing copy of Answer to Motion for Consolidation of Records and have carefully compared the same with the original thereof; and that it is a true and correct copy therefrom and of the whole thereof.

Dated January 7, 1950.

STUART W. HILL,
Of Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed Jan. 9, 1950.

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN I. HAAS, INC., a Corporation,
Appellant,

v.

O. L. WELLMAN,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the
District of Oregon.

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Equitable Building,
Portland, Oregon,
Attorneys for Appellant.

FILED

JUN 23 1950

PAUL P. O'BRIEN,
Clerk

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United States
COURT OF APPEALS
for the Ninth Circuit

JOHN I. HAAS, INC., a Corporation,
Appellant,

v.

O. L. WELLMAN,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the
District of Oregon.

JURISDICTION

This cause was commenced in the District Court of the United States for the District of Oregon, to recover the purchase price of a quantity of hops, the amount for which judgment was demanded being \$20,098.19, exclusive of interest and costs (Tr. 2, 4).

The District Court had jurisdiction of this cause by reason of Title 28, U.S.C.A., Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000, and is between citizens of different states, the defendant being a citizen of Delaware and the plaintiff of Oregon (Tr. 2, 4). Upon the repeal of that section, the District Court had jurisdiction by reason of Title 28, U.S.C.A., Section 1332.

A final judgment was entered in this cause by the District Court, in favor of the plaintiff, on September 30, 1949, for \$19,915.10, together with interest and costs (Tr. 18).

This appeal was taken pursuant to Title 28, U.S.C.A., Section 1291. The notice of appeal from such judgment was filed on October 10, 1949 (Tr. 19).

STATEMENT OF CASE

This appeal is by the defendant from a judgment for the plaintiff in an action for the contract price of hops produced by the plaintiff in the year 1947 and contracted to be sold to the defendant. The hops were rejected by the defendant as not of the grade, quality and condition required by the contract.

This is the third of three cases involving hop sale contracts tried by the same judge, each of which is now before this court on appeal, the records of all three cases being consolidated for the purpose of each appeal. The other cases are *Hugo V. Loewi, Inc., Appellant, v. Fred*

Geschwill, Appellee, No. 12440, and Hugo V. Loewi, Inc., Appellant, v. Kilian W. Smith, Appellee, No. 12441 (Tr. 9). This court has entered an order in the consolidated appeals of the three cases whereby the briefs filed in this case may adopt by reference any pertinent portions of the briefs filed in the Geschwill case.

After trial of this case without a jury, the court issued a Memorandum of Decision (Tr. 8), signed Findings of Fact and Conclusions of Law prepared by the plaintiff's counsel (Tr. 8-17), and entered judgment for the plaintiff for \$19,915.10 with interest and costs.

The contract in question was executed on February 7, 1944, and covered fuggle and cluster varieties of hops to be grown in the year 1947 and delivered to the defendant in processed and baled state. This contract covered only one-half of the plaintiff's 1947 production of hops of the contract quality. The other half was under contract to another dealer, S. S. Steiner, Inc. (Exhibit 1-A, Tr. 53).

This case involves only the cluster hops, as the fuggle hops covered by the contract were accepted and fully paid for by the defendant (Tr. 84).

The contract price for the hops was fixed in the contract at either 45¢ per pound or the market price on such date during a specified period in 1947 as the seller might elect (Exhibit 1-A, Tr. 53). The plaintiff, on September 11, 1947, orally selected the then market price of 85¢ per pound for the cluster hops (Tr. 303). That selection, however, was not confirmed in writing as required by the contract (Tr. 71, 303; Exhibit 1-A, Tr. 53), although

the defendant had issued express instructions that such requirement be complied with (Tr. 228), and had not authorized any departure therefrom (Tr. 217). Unlike the contracts involved in the Geschwill and Smith cases, the contract in this case does not include any provision for premium or discount above or below the contract price by reason of seed, leaf or stem content of the hops (Exhibit 1-A, Tr. 53).

A total of \$20,000.00 was advanced periodically by the defendant to the plaintiff as provided by the contract (Tr. 69). These advances were repaid to the defendant through deduction thereof from the defendant's payment for the fuggle hops which it received under the contract (Tr. 84).

The ultimate issues in this case are: (1) whether or not the cluster hops tendered by the plaintiff were of the grade, quality and condition required by the contract, (2) whether, in the event the hops did not conform to the contract requirements, they nevertheless were accepted by the defendant, and (3) whether, in the event the hops did conform to the contract requirements, so that the defendant's rejection was a breach of contract, the plaintiff's measure of recovery is the contract price, or is limited by contract and statute to the difference between the contract price and the market value of the kind and quality of hops described in the contract.

The contract (Exhibit 1-A, Tr. 53) provides that the hops covered thereby

“shall be of prime quality, of even color, well and cleanly picked, free from damage by vermin or disease, properly dried and cured, not broken and shall be in good merchantable order and condition.”

The contract further provides that

“should the Buyer fail to accept and pay for the hops herein agreed to be sold, the Seller not being in default in the terms and conditions hereof to be by the Seller kept and performed, in the event the market value of the hops shall be less than the contract value, the Seller shall be entitled to receive, as liquidated and ascertained damages for such breach on the part of the Buyer, the difference in value between the market value of the kind, quality and quantity of hops in this contract mentioned at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified.”

The evidence is uncontradicted and conclusive that the market value of such hops on October 31, 1947, was no less than the contract price (Tr. 225; Exhibits 13, 14, Tr. 53, 56, 57), and the District Court so found (Tr. 13).

The defendant rejected the cluster hops tendered to it by the plaintiff by reason of damage of the hops by downy mildew, a disease which discolors the hops from the normal greenish-yellow to a red or brown and kills or prevents the full maturity of the hop cones, and for the further reason that such hops were not well and cleanly picked, and thus were not of prime quality and did not comply with the requirements of the contract (Tr. 445).

The plaintiff made no pretense at the trial that the cluster hops which he tendered to the defendant com-

plied with the express contract description of the hops to be delivered. He admitted that the hops in the bales were not free from damage by disease (Tr. 118, 119) and were not of even color (Tr. 118), by reason of downy mildew which attacked the hops while they were on the vines (Tr. 119), and were not cleanly picked (Tr. 96-98). His witnesses likewise testified that the hops were damaged by mildew (Tr. 132, 154, 161), not cleanly picked (Tr. 152, 154, 155, 161), and not of even color (Tr. 155). The plaintiff acknowledged that he had even offered, prior to inspection of the hops by the defendant, to take a reduction in price because of the poor picking (Tr. 108).

The plaintiff contended that the hops nevertheless were "merchantable" (Tr. 93, 135, 158, 161), or of "good, salable quality" (Tr. 116), and were equal to the average of the hops produced in 1947 in the Willamette Valley (Tr. 93, 133, 134, 135, 152, 153, 158, 160), and that they were accepted by the defendant by reason of the weighing thereof by employees of the defendant's Oregon representative (Tr. 83).

The District Court made no specific finding as to whether or not the hops tendered by the plaintiff to the defendant were of prime quality or otherwise complied with the express description in the contract with respect to grade, quality and condition. The court found merely that the hops were "of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by the defendant under contracts containing in effect the same

provisions as to quality" (Tr. 15). The court also found, however, that the leaf and stem content of the plaintiff's cluster hops was 11 per cent, and that the 1947 Oregon average was 8 per cent (Tr. 13). The plaintiff's hops thus exceeded the average in extraneous leaf and stem content by more than 37 per cent.

A heavy infestation of downy mildew developed in many of the cluster hop yards in the Willamette Valley in Oregon in July and early August, 1947. The attack that year was almost unique in that it came late in the growing season and thus affected the hops themselves rather than merely the vines (Tr. 98, 340).

The plaintiff's cluster yard was one of the yards thus affected (Tr. 98, 99). Nevertheless, he decided to proceed with the harvest and requested and obtained from the defendant a final harvesting advance of \$5,000.00. This was only half of such advance provided for by the contract, but was deemed sufficient because of the reduced crop resulting from the mildew attack (Tr. 73, 278, 397, 398).

The business dealings of these parties in 1947 and prior years were conducted through A. J. Ray & Son, Inc., of Hillsboro, Oregon, which for many years had purchased hops in Oregon for the defendant (Tr. 163). Prior to 1947, the defendant frequently had authorized that firm to accept or reject contracted hops on the basis of the defendant's inspection of preliminary "type" samples of those hops, in which case the Ray firm had the responsibility of determining, by its examination of each bale and of 10th bale samples, which bales of

the hops were equal in quality to the type samples approved by the defendant, and of taking delivery of those bales and rejecting any other (Tr. 234, 248, 249).

In 1947 the defendant did not inspect merely the type samples, but required the Ray firm to send 10th bale samples correctly representing each lot of hops, in addition to the type samples, to the defendant's office in Washington, D. C., for inspection there by the defendant. The Ray firm was authorized to accept only such hops as were approved by the defendant after its own inspection of both the type samples and the 10th bale samples (Tr. 166, 233, 437, 448-450, 461; Exhibit 18, Tr. 53, 57, 422; Exhibit 7, Tr. 53, 56, 250; Exhibit 3-G, Tr. 53, 54).

This procedure was followed in 1947 relative to the plaintiff's cluster hops. Four type samples were drawn from bales of those hops and forwarded to the defendant in Washington, D. C. (Exhibit 3-E, Tr. 53). Thereafter, when all of the hops had been baled and warehoused by the plaintiff, employees of the Ray firm drew nineteen 10th bale inspection samples which were representative of the entire lot of 193 bales, and these samples likewise were sent on to the defendant (Tr. 80, 306; Exhibit 3-J, Tr. 53, 54). After the defendant's inspection of these samples, the defendant instructed the Ray firm to reject the entire lot of cluster hops, as not of contract grade, quality or condition (Exhibit 3-U, Tr. 53, 55; Tr. 186, 187). The uncontroverted evidence in this case shows clearly that neither the Ray firm nor any one connected therewith had any authority at any time to accept or

take delivery on behalf of the defendant of any of the plaintiff's 1947 crop cluster hops (Tr. 217, 437).

There were parts of the plaintiff's cluster yard which the mildew attack did not reach at all (Tr. 103). From one part of his yard which was practically free of mildew (Tr. 104), the plaintiff harvested separately from any other hops the equivalent of about 64 bales of hops. These hops showed little or no mildew. The first type sample taken for the defendant was drawn from a bale of these hops at the hop yard on September 13 by Gilbert Davis, an employee of the Ray firm. The plaintiff informed Mr. Davis at that time that he had in the bins separate from any other hops the equivalent of about 64 bales of hops equal in quality to that sample (Tr. 348, 349). This sample therefore was designated as representative of an estimated 32 bales of equal quality to be available for delivery under the defendant's one-half contract share of the plaintiff's production (Tr. 170; Exhibit 3-E, Tr. 53). This first sample showed little or no mildew, but an additional three type samples drawn thereafter as the harvesting and baling progressed, did contain considerable mildew, including many of the mildew-killed hops known as "nubbins" (Tr. 367). All four of the type samples were sent to the defendant in Washington, D. C., on September 15 (Exhibit 3-E, Tr. 53, 349).

The plaintiff warehoused 386 bales of cluster hops, of which 193 bales were each sampled and 10th bale samples taken therefrom by employees of the Ray firm on September 25th. The other half was similarly sampled

at that time by representatives of the other buyer, S. S. Steiner, Inc. (Tr. 80). This sampling was done in the usual manner and is acknowledged by the plaintiff to have been done properly (Tr. 80, 116).

Only one or two bales were found equal to the first type sample taken by the defendant on September 13, and when questioned as to what had been done with the 32 bales supposedly represented by that sample, the plaintiff explained that he had not baled separately the estimated 64 bales of hops harvested from the mildew-free part of his yard and which he had on hand when that first type sample was taken, but that he had thereafter mixed and baled those good hops with the hops harvested from the rest of his yard (Tr. 104, 170, 171, 309, 310, 396). The 10th bale samples accordingly were designated as representative of the entire 193 bales, and sent on to the defendant. The defendant was informed of the disappearance of the 32 bales and that the first type sample therefore should be cancelled (Tr. 172; Exhibit 3-J, Tr. 53, 54; Exhibit 3-M, Tr. 53, 54; Exhibit 3-N, Tr. 53, 54).

A "split" or approximately one-half of each of the 10th bale samples was retained in the office of the Ray firm. Several of these are in evidence as Exhibits 11-A to N (Tr. 53, 56, 150, 172).

Samples of the plaintiff's cluster hops were drawn by the Federal-State Inspection Service at the same time that the 10th bale samples were being drawn by the Ray firm, for the purpose of making its official determination of the leaf, stem and seed content of the hops. The gov-

ernment analysis of those samples was made at a later date and was not known by either party until issuance on October 9th of the official Inspection Certificate (Tr. 196, 333; Exhibit 1, Tr. 53), showing the hops to contain 11 per cent by weight of extraneous leaves and stems. Such leaf and stem content does not include hops damaged by mildew, such as nubbins (Tr. 200, 343). This 11 per cent leaf and stem content of the plaintiff's hops is far in excess of the average for Oregon hops of that year, according to official records of the Federal-State Inspection Service (Tr. 342, 343).

Upon completion of their sampling of the cluster hops on September 25, the employees of the Ray firm proceeded to weigh all of the 193 bales. This was done in order to avoid the necessity of again unpiling and weighing the bales in the event of their later acceptance by the defendant (Tr. 166, 283, 311, 447, 448). Mr. Ray previously had instructed Mr. Noakes, manager of the Salem office of A. J. Ray & Son, Inc., who was handling the arrangements with the plaintiff, that inasmuch as the Ray firm had no authority to accept hops except upon express instructions of the defendant following the defendant's examination of 10th bale samples, Mr. Noakes must not take 10th bale samples or weigh any grower's hops without having an understanding with the grower that such would not constitute an acceptance (Tr. 166, 167, 280, 281, 317, 324, 325, 330, 331). These instructions to Mr. Noakes were in accordance with express instructions from the defendant (Tr. 180, 182; Exhibits 3-H, 3-I, Tr. 53, 54).

The defendant, on September 25, telegraphed the Ray firm to notify each grower by letter that sampling and weighing would not constitute acceptance (Exhibit 5, Tr. 53, 56, 185). Accordingly the Ray firm addressed a letter to each grower under contract with the defendant explaining that hops tendered under the contract would be inspected, sampled and weighed as rapidly as possible, with the understanding that such would not constitute an acceptance of the hops, and that the 10th bale inspection samples would be sent to the defendant in Washington, D. C., for examination and decision (Exhibit 12, Tr. 53, 56). Such letter, however, was not sent to the plaintiff for the reason that his hops already on that date were being sampled and weighed by Mr. Noakes acting under specific instructions from Mr. Ray first to obtain the plaintiff's oral agreement that such would not be an acceptance (Tr. 193, 194, 271-273).

Mr. Noakes testified that he did have an oral agreement with the plaintiff that the sampling and weighing of the cluster hops would not be considered an acceptance of the hops; that the plaintiff was anxious to get away on a hunting trip and urged that he inspect the hops as soon as possible and that Mr. Noakes told him that the only way he could possibly do so was for him to go through the hops, draw 10th bale samples and send them on to Washington, D. C., for approval; and that Mr. Noakes suggested that the hops also be weighed at that time to save taking the hops out for weighing in the warehouse at a later date, but all without accepting the hops because he had no authority to accept them under any conditions (Tr. 283, 284). Mr. Noakes fur-

ther testified that in the warehouse immediately after weighing the hops he again told the plaintiff that the 10th bale samples had to be sent in for approval (Tr. 332). This testimony was corroborated by Mr. Davis (Tr. 369).

The plaintiff denied having any such oral agreement or any conversation relative to the sampling and weighing of the hops on September 25 not being an acceptance (Tr. 398) and denied that he was told prior to or immediately after the weighing that the samples were to be sent to the defendant (Tr. 405). He did acknowledge, however, that shortly after his return from his hunting trip on October 5 he was told by Mr. Noakes that the Ray firm had no authority to accept hops and must send all samples to the Washington, D. C., office for acceptance or rejection (Tr. 406, 409).

Mr. Howard Eismann, Oregon representative of S. S. Steiner, Inc., the contract purchaser of the other half of the plaintiff's hops, testified that the Steiner firm rejected its half of the cluster hops because they were of poor quality and not equal to contract specifications similar to those of the defendant's contract (Tr. 380, 381). He also testified that he had an oral understanding with the plaintiff prior to his sampling and weighing of the hops for the Steiner firm that such would not constitute an acceptance, but that the plaintiff later refused to recognize that agreement (Tr. 377-380), and the plaintiff denied having had any such agreement (Tr. 90). He further testified that Mr. Noakes of the Ray firm told him prior to the weighing of the defendant's

share of the hops that Mr. Noakes had an understanding with the plaintiff that the sampling and weighing of those hops would not constitute an acceptance (Tr. 378).

Mr. Noakes reported to Mr. Ray on the evening of September 25 that he had inspected, sampled and weighed the plaintiff's hops with the plaintiff's agreement that such would not be considered an acceptance of the hops (Tr. 168, 196, 263, 264), and the Ray firm in turn reported to the defendant that it had inspected the plaintiff's hops without committing the defendant to acceptance of those hops (Exhibit 3-O, Tr. 53, 54; Tr. 200; Exhibit 3-Q, Tr. 53, 55, 205, 206).

On October 18 the defendant, following its inspection of the 10th bale samples, instructed A. J. Ray & Son, Inc., to reject the plaintiff's cluster hops (Exhibit 3-U, Tr. 53, 55, 186, 187; Exhibit 3-W, Tr. 53, 55).

There is no conflict of evidence relative to the quality of the type and 10th bale samples of the plaintiff's cluster hops on which the defendant based its refusal to accept the hops. Mr. Frederick Haas, Vice-President of the defendant, saw the type samples in the office of the Ray firm in September and found them to be very poor, showing damage by mildew, including "little red nubbins throughout the hops," not even colored, and not cleanly picked (Tr. 443, 444). Mr. Haas also personally examined the 10th bale samples in the defendant's Washington, D. C., office and found them to be substantially damaged by mildew disease and poorly picked, and obviously not of prime quality (Tr. 444). He testified that they were rejected by the defendant because

they were not free from disease and were not cleanly picked, as called for in the contract specifications (Tr. 445).

Mr. Harold W. Ray, President and Manager of the Ray firm, testified that the 10th bale samples, which he examined prior to sending them to the defendant, showed that the hops were very dirty picked, and were damaged by mildew, including a large content of brown mildewed nubbins which made the hops very undesirable, and that not one of the 10th bale samples came up to prime quality (Tr. 182-184). Mr. Gilbert Davis, who drew the type samples and assisted in drawing the later 10th bale samples, testified that the samples had considerable mildew discoloration (Tr. 360, and that the hops were not cleanly picked (Tr. 368).

These descriptions of the samples were corroborated by the defendant's expert witnesses, Howard Eismann and H. V. Franklin, who examined in the courtroom the 10th bale samples in evidence as Exhibit 11-A to N (Tr. 53, 56, 150, 172). Mr. Eismann testified that the samples could not have been prime quality hops when drawn from the bales because they were dirty picked and contained a "great quantity" of downy mildew damage. He pointed out that each sample contained a substantial quantity of nubbins and also showed a decided damage to many of the burrs, as well as burrs which, because of the mildew, were only partially developed (Tr. 373). He explained that the hops were "dirty picked" and not "well and cleanly picked" because of the high percentage of leaves and stems (Tr. 374). He

further testified that the mildew discoloration of many of the burrs prevented the hops being of even color and that there could be no possible doubt that the hops were not of prime quality (Tr. 374, 375), and that although such hops would be merchantable they were not "good" merchantable hops (Tr. 375).

Mr. Franklin described the hops as containing considerable mildew damage and being dirty picked, with about half the hop cones showing mildew damage and with discoloration from mildew appearing throughout the samples; that the hops were not of even color, not free from damage by disease, and not well and cleanly picked as that term is commonly used in the industry (Tr. 394). He found the damage by mildew to be readily apparent and beyond question (Tr. 394).

Upon receipt of the defendant's rejection of the cluster hops, Mr. Ray instructed Mr. Noakes to communicate that rejection to the plaintiff (Tr. 187, 188, 201, 202, 266, 273), and Mr. Noakes reported to Mr. Ray that he had done so on October 28 (Tr. 189, 204, 267). The Ray firm then notified the defendant that the plaintiff's cluster hops had been rejected as per instructions (Exhibit 3-Y, Tr. 53, 55; Tr. 190, 191). Notation of such rejection was indorsed upon the original weight sheets during the last week in October by the office manager of the Ray firm (Tr. 264, 265; Exhibit 2, Tr. 53).

The fuggle hops tendered by the plaintiff under the contract were accepted by the defendant and paid for in full. The defendant was reimbursed for all advances it had made under the contract, including the harvest

advance on the cluster hops, by deduction of the amount thereof from the sum payable for the fuggle hops. A check for the balance and in full settlement for the fuggle hops was delivered to the plaintiff by Mr. Noakes, and was accepted by the plaintiff, on October 28, and was cashed by the plaintiff. A detailed statement of the account accompanied the check (Tr. 84, 294, 295; Exhibits 1-B, 1-E, Tr. 53).

Mr. Noakes testified that at the time he notified the plaintiff, on October 28, that his fuggle hops were accepted, and paid him for those hops by giving him a check for the balance remaining after deduction of all the advances, he also informed the plaintiff that the defendant could not accept the cluster hops on the contract because they did not make the grade due to the picking (meaning excessive extraneous matter) and the mildew damage (Tr. 292, 293, 295, 296, 320, 321), and that the plaintiff understood that the quality of the hops was such that the defendant would not accept them (Tr. 321).

This was corroborated by Gilbert Davis, who was present on October 28 when the fuggle hops were paid for, and who testified that he heard Mr. Noakes tell the plaintiff that "We can't take those late hops, Otto" (Tr. 355). Both Mr. Noakes and Mr. Davis testified that when told that the cluster hops were not accepted, the plaintiff threatened to withhold delivery of the fuggle hops but finally handed to Mr. Noakes the warehouse receipt for the fuggles (Tr. 293, 355, 356).

The plaintiff denied that he was informed that his

cluster hops were rejected or not accepted by the defendant (Tr. 85, 87, 88, 91, 92, 109, 401). His version of the discussion on October 28 is that Mr. Noakes told him that "The lates (meaning cluster hops) just haven't come through" (Tr. 402). His complaint (Tr. 4) alleges, however, and the District Court found (Tr. 14, 15) that in October, 1947, the defendant advised the plaintiff that it did not wish to take the hops and at that time and from time to time thereafter suggested that the plaintiff try to find some other buyer for the hops.

Testimony by Mr. Noakes that he told the plaintiff that the cluster hops were "not very good quality" (Tr. 285) and that the plaintiff asked Mr. Noakes to try to dispose of the hops (Tr. 295, 298) is not denied by the plaintiff. In fact the plaintiff testified that when Mr. Noakes told him that he had not done too good a job of picking he replied, "Cliff, I know that, I have done the best I could" (Tr. 78, 79), and that when Mr. Noakes told him they should have been "a little better picked" he told Mr. Noakes that he would be willing to take a cut in price because of the leaf and stem content (Tr. 108).

The plaintiff discussed his cluster hops with Mr. Noakes and with Mr. Ray on several occasions after the acceptance of and payment for his fuggle hops on October 28. He conferred with Mr. Ray on two occasions prior to the Christmas holidays in 1947. The testimony of the plaintiff and of Mr. Ray concerning the discussions on those occasions is in agreement that Mr. Ray told the plaintiff that he would do his best to find a

buyer for the cluster hops, that Mr. Ray told the plaintiff that he thought the defendant had a moral, but not a legal, obligation to pay for the hops, and that Mr. Ray further stated that because of the mildew it probably was harder to move these hops (Tr. 86, 109, 206, 207, 210). Both witnesses further agreed that during these discussions no mention was made of any payment for the cluster hops, and that the plaintiff made no inquiry concerning payment and no demand for payment (Tr. 86, 209). Nor did the plaintiff ever ask Mr. Noakes for payment, or inquire why he had not been paid for the cluster hops (Tr. 297).

Mr. Ray further testified concerning those discussions that the plaintiff at that time inquired whether there might be some sort of cash settlement whereby the defendant would stand part of the loss on the cluster hops, and that Mr. Ray told the plaintiff that he didn't think there was any chance that the defendant would do so (Tr. 208). This was corroborated by Mrs. Townsend, the office manager of Mr. Ray's office, who overheard that discussion between Mr. Ray and the plaintiff (Tr. 259). Mr. Ray further testified that he advised the plaintiff to do everything he could to find a place for the cluster hops himself (Tr. 260). None of this testimony was denied by the plaintiff.

The plaintiff's cluster hops are not listed in the Ray firm's hop books wherein are recorded all acceptances of hops for the defendant (Tr. 269). No insurance was carried by the Ray firm or by the defendant on the plaintiff's cluster hops, although it was the practice of

the Ray firm promptly to bring under its blanket fire insurance policy all hops accepted for the defendant (Tr. 211, 212, 268). No warehouse receipt covering the cluster hops was delivered or tendered to the defendant or to the Ray firm (Tr. 105, 298).

The 193 bales of cluster hops which the plaintiff had tendered to the defendant and which the defendant had rejected were resold by the plaintiff on May 7, 1948, at a price of 31 cents per pound, and the plaintiff received therefor the total sum of \$11,904.31, which according to the evidence was a fair price for those hops on that date (Tr. 91, 226, 370, 371).

SPECIFICATION OF ERRORS

The District Court erred:

1. In finding that by the contract of February 7, 1944, the plaintiff agreed to sell and the defendant agreed to buy one-half of the salable crop of hops grown by the plaintiff in 1947 on his farm, and in basing the judgment thereon (Tr. 10). Such finding is clearly erroneous and is unsupported by substantial evidence, as the agreement itself implies and the law provides that the defendant was required to accept and pay for only those hops which met the standards of quality and condition specified in the agreement (Exhibit 1-A, Tr. 53).

2. In finding that the one-half of the 1947 crop of late cluster hops involved here was duly grown and raised by plaintiff on said farm, and in basing the judgment thereon (Tr. 10). Such finding is clearly erroneous

and is unsupported by substantial evidence, if such finding is construed to mean that the plaintiff grew and raised cluster hops of such character as to meet the obligations imposed on him by said contract, as the undisputed evidence established that the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 393, 443-445).

3. In finding that before and at the time of picking the defendant knew that said crop of cluster hops would in normal course show such mildew when picked and baled, and in basing the judgment thereon (Tr. 11). Such finding is clearly erroneous and is unsupported by substantial evidence. Furthermore, this finding is wholly irrelevant and immaterial as the plaintiff assumed the risk of mildew damage in his baled hops.

4. In finding that the mildew in said late cluster hops did not become more pronounced or prevalent after the defendant elected to make such advance payment, and in basing the judgment thereon (Tr. 11). Such finding is clearly erroneous and is unsupported by substantial evidence.

5. In finding that the plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon, and in basing the judgment thereon, if such finding is construed to mean that the plaintiff raised, harvested, cured and baled hops of such character as to meet the obligations imposed upon him by said contract (Tr. 12). Such finding is

clearly erroneous and is unsupported by substantial evidence, as the undisputed evidence establishes that the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 393, 443-445).

6. In finding that on September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties, and that at that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence. If said finding can be construed to mean that the plaintiff appropriated said hops to the contract with the assent of the defendant, there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff. The only evidence on this point is that the defendant, by rejecting the hops, expressed a decided unwillingness to take them as its own (Tr. 4, 14, 15). Furthermore, there is no evidence whatever that the defendant received said hops at any time. Finally, said hops were not inspected at that time or place, but were subsequently inspected at the defendant's office at Washington, D. C. (Tr. 437, 444, 445, 447).

7. In finding that the plaintiff duly performed all of the terms and conditions of said contract on his part to be performed, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence, if the contract is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 393, 443-445).

8. In finding that at the time said contract was entered into, and at the time of the delivery and weighing of the late cluster hops, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing of hops by the buyer following such an inspection constituted an acceptance of such hops, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence. There is insufficient evidence to establish that any such usage or custom existed at any time mentioned in such finding, or at any other time. Furthermore, whether any such usage or custom existed at any time after said contract was entered into, is wholly irrelevant and immaterial. If any such usage or custom did exist at any material and relevant time, it cannot be applied under the circumstances of this case. Finally, there is no evidence whatever that said hops were inspected by the defendant at the time of or before the weighing of said hops. The only inspection by the defendant was subsequently made in Washington, D. C. (Tr. 437, 444, 445, 447).

9. In finding that the parties did not agree upon any change in or deviation from, and plaintiff did not waive, said custom and usage, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence.

10. In finding that the defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff, and in basing the judgment thereon (Tr. 12, 13). Such finding is clearly erroneous and is unsupported by substantial evidence, and is contrary to law, in that it is acknowledged by the plaintiff in his complaint and the court has found as a fact that in October, 1947, the defendant notified the plaintiff that it did not wish to take said hops (Tr. 4, 14, 15). It is undisputed that the defendant refused to accept such hops, in October, 1947.

11. In finding that said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to the defendant and which conformed to the prior practice between the parties and in basing the judgment thereon (Tr. 13). Such finding is clearly erroneous and is unsupported by any substantial evidence, as it is undisputed that the plaintiff did not designate any grower market price in writing as required by said contract.

12. In finding that according to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by de-

ducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent, and in basing the judgment thereon (Tr. 13). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is insufficient evidence that such custom or usage existed at any time which was material and relevant. Furthermore, such custom and usage can not be given effect contrary to the express terms of the contract (Exhibit 1-A, Tr. 53).

13. In finding that the parties designated the grower market price pursuant to said contract at 85 cents per pound without reference to leaf and stem content, and in basing the judgment thereon (Tr. 13, 14). Such finding is clearly erroneous and is unsupported by any substantial evidence. The undisputed evidence shows that no designation was made by the plaintiff, in writing, as required by said contract. Furthermore, if any designation was made by the plaintiff of said grower market price, in conformity to the terms of said contract, such designated price was for hops of the standards of grade, quality and condition specified in such contract (Exhibit 1-A, Tr. 53).

14. In finding that the grower market price for said hops under said contract was 85 cents per pound net weight, less three cents per pound deduction for leaf and stem content, and that the contract price for said hops was 82 cents per pound, or a total of \$30,863.16, and in basing the judgment thereon (Tr. 14). Such finding is clearly erroneous and is unsupported by substantial evidence. It is contrary to the express terms of

the contract. Furthermore, said price of 82 cents per pound was not selected by the plaintiff in the manner required by said contract, and is not binding upon the defendant. The plaintiff, not having selected a market price in accordance with the terms of the contract, is bound by the floor price stated in said contract, 45 cents per pound (Exhibit 1-A, Tr. 53).

15. In finding that when the hops were tendered to defendant and defendant had inspected the same as aforesaid, and subsequently when defendant advised plaintiff that it did not wish to take said hops, defendant did not specify any particular objection it may have had to said hops, and in basing the judgment thereon (Tr. 14). Such finding is clearly erroneous and is unsupported by substantial evidence, except that portion which declares that the defendant advised the plaintiff that it did not wish to take said hops. Furthermore, such hops were not inspected at the time of tender or weighing or on that occasion, as they were subsequently inspected by the defendant in Washington, D. C. (Tr. 437, 444, 445, 447).

16. In finding that at the trial the defendant advanced two specific objections that said cluster hops showed some mildew and were somewhat above average in leaf and stem content, and in basing the judgment thereon (Tr. 14, 15), if that finding is construed to mean that the defendant contended that the degree of mildew infestation was slight, and that said hops were only slightly above average in leaf and stem content. Such finding is clearly erroneous and is unsupported by sub-

stantial evidence, as the evidence is undisputed that the defendant contended at the trial that the plaintiff's hops were substantially damaged by mildew and were substantially above average in leaf and stem content (Tr. 96-98, 182, 342, 374, 393, 445).

17. In finding that upon the facts neither claimed defect (that said hops showed mildew and were above average in leaf and stem content), was material, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, as it is undisputed that if the agreement between the parties is construed in the manner advocated by the defendant, the failure of the plaintiff's hops to meet the standards of grade, quality and condition specified in the agreement, was substantial (Tr. 96-98, 118, 182, 373-375, 393, 443-445).

18. In finding that the plaintiff delivered the very hops which were covered by the contract and upon which the defendant had made advance payments, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract covered future or unascertained goods deliverable only after processing (Exhibit 1-A, Tr. 53). Furthermore, the contract implies and the law provides that the defendant was bound to accept and pay for only hops meeting the standards of grade, quality and condition specified in the contract.

19. In finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of cluster hops

would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract plainly implies and the law provides that the defendant was not obligated to accept and pay for any hops tendered to it which did not meet the standards of grade, quality and condition specified in such contract (Exhibit 1-A, Tr. 53). In the absence of evidence to the contrary, it must be conclusively presumed that the defendant did rely upon the warranty in the contract; there was no such evidence.

20. In finding that said cluster hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by the defendant under contracts containing in effect the same provisions as to quality, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, and does not form a proper basis for the judgment, as the contract cannot be construed to mean that average quality hops meet the standards of grade, quality and condition specified therein. Furthermore, such finding is wholly irrelevant and immaterial.

21. In finding that said cluster hops, upon tender and delivery, substantially conformed to the quality provisions of said contract and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant,

as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96-98, 118, 182, 373-375, 393, 443-445).

22. In finding that without rejecting said late cluster hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops, and in basing the judgment thereon (Tr. 15). The defendant acknowledges that it advised the plaintiff in October, 1947, that it did not wish to take said hops, and acknowledges that such portion of said finding is proper. The remainder of such finding is clearly erroneous and is unsupported by substantial evidence, and is contrary to law. By refusing to accept said hops, and so notifying the plaintiff, the defendant rejected them, as a matter of law.

23. In finding that the parties hereto from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, as the evidence establishes that the defendant did no more than to attempt to find another buyer for the plaintiff's hops.

24. In finding that there had been a material decline in the general market price and demand for 1947 Oregon late cluster hops, and in basing the judgment thereon (Tr. 15, 16). Such finding is clearly erroneous and is unsupported by substantial evidence, as this finding is contrary to the undisputed evidence in this case (Geschwill Exhibit 33, Tr. 285; Tr. 361, 363, 416, 419).

25. In finding that the defendant was in default in the payment of the purchase price of said cluster hops and that \$19,915.10 was due and owing from the defendant, as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 96, 118, 182, 373-375, 394, 443-445). The defendant's rejection of said hops was therefore justified.

26. In deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties on his part to be performed (Tr. 16). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 394, 443-445).

27. In deciding that the property in said cluster hops passed to the defendant (Tr. 16), as this decision is contrary to law for two reasons: (1) As this was a sale for cash, title did not pass to the defendant as the defendant has never paid for the hops. (2) If this was not a sale for cash or cash on delivery, title did not pass as the hops did not meet the standards specified in the contract and the conditional assent of the defendant to the appropriation of the hops, implied from the delivery of the hops to the warehouse by agreement, was withdrawn by the rejection of such hops.

28. In deciding that the defendant became obligated to pay the plaintiff on or before October 31, 1947, the sum of \$30,863.16, less the proceeds of the resale (Tr. 16, 17), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 96, 118, 182, 373-375, 394, 443-445).

29. In deciding that the defendant wrongfully refused to and did not perform its obligation under said contract (Tr. 17), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 96, 118, 182, 373-375, 394, 443-445).

30. In deciding that the measure of the plaintiff's recovery upon the facts here is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale (Tr. 17), as the contract provides that in the event of a breach by the buyer, the measure of damages is fixed and determined to be the difference in value between the market value of the kind, quality and quantity of hops mentioned in the contract, at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified (Exhibit 1-A, Tr. 53). The plaintiff is bound by that provision.

31. In failing and refusing to apply the provision in said contract (Exhibit 1-A, Tr. 53), which fixed and determined the measure of damages as the difference in value between the market value of the kind, quality and quantity of hops mentioned in the contract, at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified (Exhibit 1-A, Tr. 53). The plaintiff is bound by that provision.

32. In failing and refusing to sustain the first defense in the defendant's answer (Tr. 6), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference in value between the market value of the kind, quality and quantity of hops mentioned in the contract, at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified (Exhibit 1-A, Tr. 53). The plaintiff is bound by that provision.

ARGUMENT

Summary of Argument

I. The findings of fact with respect to the quality and condition of the hops tendered by the plaintiff to the defendant, are clearly erroneous and are unsupported by any substantial evidence.

II. The defendant was not bound to take delivery of the plaintiff's hops and was justified in rejecting them.

III. The court erred in concluding as a matter of law that the plaintiff substantially performed all of the terms and conditions of the contract on his part to be performed, and that the defendant wrongfully refused to and did not perform its obligation under said contract.

IV. The finding of fact that the defendant accepted the plaintiff's cluster hops is clearly erroneous and is unsupported by any substantial evidence, and is contrary to law.

V. The finding of fact that the defendant did not reject the plaintiff's hops is clearly erroneous and is unsupported by any substantial evidence, and is contrary to law.

VI. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the facts of this case do not bring it within the operation of the provisions of the Uniform Sales Act which permit such an action.

VII. The court erred in concluding as a matter of law that the property in the plaintiff's cluster hops passed to the defendant, and that the defendant became obligated to pay an amount claimed to be the price of the hops under said contract, less the amount realized from the resale.

VIII. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the contract itself precludes that measure of recovery.

IX. The court erred in concluding as a matter of law that the measure of the plaintiff's recovery upon the

facts here is, under Oregon law, the difference between the amount due under said contract and the amount realized from the resale.

I

THE FINDINGS OF FACT WITH RESPECT TO THE QUALITY AND CONDITION OF THE HOPS TENDERED BY THE PLAINTIFF TO THE DEFENDANT, ARE CLEARLY ERRONEOUS AND ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE

The defendant contends that no substantial evidence was introduced tending to establish that the hops tendered by the plaintiff to the defendant met the standards of quality and condition specified in the contract of sale.

The contract describes the grade, quality and condition of the hops to be delivered in these words (Exhibit 1-A, Tr. 53):

“The said hops shall be of prime quality, of even color, well and cleanly picked, free from damage by vermin or disease, properly dried and cured, not broken and shall be in good merchantable order and condition.”

It is evident that this clause is similar to the comparable provision in the Geschwill contract.

The portions of the Findings of Fact claimed to be clearly erroneous and not supported by any substantial evidence, will be considered separately.

1. Paragraph 14 of Findings of Fact (Tr. 15):

“Said hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by defendant under contracts containing in effect the same provisions as to quality. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.”

This is practically identical to the corresponding finding in the Geschwill case. Consequently the three minor headings in that brief, page 21, are retained.

1. Paraphrase of Paragraph 14 of Findings of Fact (Tr. 15):

- (a) Hops which are of average quality and condition conform to the warranty contained in the contract.

The testimony concerning the meaning which must be given to the warranty in this contract, was introduced in the Geschwill case. A summary appears in the brief filed in that case, pages 21 and 22, which is incorporated herein by reference.

By reason of the stipulation and order under which these cases were tried, no similar evidence was received in this case (Geschwill Tr. 503, 504), except that Mr. Ray and Mr. Haas stated that “prime quality” does not mean “average quality of the year for the state” (Tr. 224, 451).

The defendant contends that inasmuch as the description of the hops to be delivered is almost the same

in these two cases, the authorities and practical considerations which are discussed under heading I, subdivision 1(a), in the Geschwill brief, pages 23 to 27, establish that the term "prime quality" in the Wellman contract does not mean "average quality for the year in which grown," but that it does mean that the hops shall be of prime quality, of even color, well and cleanly picked, free from damage by vermin or disease, properly dried and cured, not broken and shall be in good merchantable order and condition.

1. Paraphrase of Paragraph 14 of Findings of Fact (Tr. 15):

- (b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

Witnesses called by the plaintiff testified that his hops were equal to the average of the hops produced in 1947 in the Willamette Valley (Tr. 133-135, 152, 153, 158, 160). They also said that his hops were "merchantable" (Tr. 135, 158, 161). These witnesses acknowledged, however, that such hops were damaged by mildew (Tr. 132, 154, 161), were not cleanly picked (Tr. 152, 154, 155, 161), and were not of even color (Tr. 155).

The plaintiff himself admitted that his baled hops were not free from damage by disease (Tr. 118, 119), were not of even color by reason of downy mildew (Tr. 118, 119), and were not cleanly picked (Tr. 96-98). The plaintiff testified that his hops were nevertheless "merchantable" (Tr. 93), or of "good, salable quality" (Tr. 116), and were equal to the average of the hops

produced in 1947 in the Willamette Valley (Tr. 93).

All of this testimony was directed to the question whether the plaintiff's hops were of average quality for the year in which grown, in the Willamette Valley. None of it had any bearing on the real issue whether the plaintiff's hops were of "prime quality" as that term is defined in the warranty.

The testimony introduced by the defendant, on the other hand, establishes that this plaintiff's hops were heavily damaged by mildew, and that they were therefore not of prime quality, and were not of "even color," or "cleanly picked," as expressly required by the contract (Exhibit 1-A, Tr. 53; Tr. 182-184, 343, 373-375, 393, 394, 443-445).

Two disinterested witnesses, Mr. Howard Eismann and Mr. H. F. Franklin, testified that the 10th bale samples of the plaintiff's hops examined by them were not of prime quality because they showed considerable mildew damage, were not cleanly picked, were not of even color, and were not free of damage by disease. Mr. Eismann stated that these samples showed a great quantity of downy mildew damage in that they contained a substantial number of nubbins, dead, brown burrs or cones, and that many of the burrs were damaged by mildew to such an extent that they were of a brownish red color. Mr. Franklin stated that the samples showed considerable mildew damage; he added that about half of the cones were discolored from mildew (Tr. 373-375, 393, 394).

Mr. Frederick J. Haas, Vice-President of the defend-

ant, and Mr. Ray, the defendant's Oregon representative, both testified in its behalf. Both stated that the plaintiff's hops were seriously damaged by mildew and were not cleanly picked. Both stated that the hops were not of prime quality, were not of even color and were not free from damage by disease. Mr. Ray stated that the hops were "very dirty picked" (Tr. 182-184, 222, 223, 443-445).

The testimony of Mr. Bert W. Whitlock is significant. He was then in charge of hop inspection work on the Pacific Coast for the U. S. Department of Agriculture with particular reference to the leaf and stem and seed content of hops. He testified that approximately 83 per cent of the hops grown in Oregon in 1947, had a leaf and stem content of less than 11 per cent and that the remaining 17 per cent of such hops had a leaf and stem content of 11 per cent or more (Tr. 341, 342). The average leaf and stem content in Oregon hops in 1947 was 8.09 per cent. 57.27 per cent of the total produced in Oregon that year had leaf and stem content of 8 per cent or less (Tr. 342, 343).

The court is also referred to a finding made by the trial court in paragraph 10 in which these words are used (Tr. 13): "The leaf and stem content of said late cluster hops was eleven per cent or three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947." This finding establishes that the plaintiff's hops had $37\frac{1}{2}$ per cent more extraneous leaves and stems than the average of the hops harvested and baled in Oregon in 1947.

The testimony of the plaintiff's witnesses is not in conflict with the foregoing but is directed simply to the question whether his hops were of average or "merchantable" quality. The defendant's witnesses, on the other hand, directed their testimony to the question whether such hops were of "prime quality" as that term is defined in the warranty itself.

It is equally evident that if the court construes this contract in the manner advocated by the defendant, it must be said that there is no substantial evidence tending to establish that the plaintiff's hops were of prime quality.

1. Paraphrase of Paragraph 14 of Findings of Fact (Tr. 15):

- (c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

In the first place, it is well settled that evidence of collateral transactions is not relevant when offered to establish the terms of a contract between the parties or that it was breached by one of them, for the reason that the rights of the parties can not be affected or concluded by such collateral transactions.

Citations supporting that proposition are found in the Geschwill brief, page 31.

In the second place, there is no evidence in support of the finding now being considered, except such as is so indefinite as to be wholly meaningless.

2. Paragraph 13 of Findings of Fact (Tr. 15):

“Upon the facts neither claimed defect (that the plaintiff’s hops were blighted and ‘dirty picked’) was material.”

While the materiality of the objection advanced by the defendant is probably a mixed question of law and fact, it is clear that, insofar as the finding is one of fact, it is unsupported by any substantial evidence.

The oral testimony produced by the defendant shows that the plaintiff’s hops were seriously or heavily damaged by mildew. Furthermore, the trial court found as a fact that these hops contained $37\frac{1}{2}\%$ more leaves and stems than the average lot of 1947 hops grown in the Willamette Valley (Tr. 13).

3. Paragraph 14 of Findings of Fact (Tr. 15):

“Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered.”

There is no testimony whatever which remotely tends to support that finding. Both of these parties signed this contract containing the express warranty we have been considering, and it must be conclusively presumed that the defendant would not have entered into this contract if it had not expected and desired to receive prime quality hops, at least in the absence of substantial proof to the contrary. There was no such evidence.

4. Paragraph 7 of Findings of Fact (Tr. 12):

“Plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon.”

5. Paragraph 7 of Findings of Fact (Tr. 12):

“Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed.”

If what has been said in the argument under this heading I is correct and sound, the plaintiff did not perform all of the terms and conditions of said contract in such manner as to meet the obligations imposed thereby.

6. Paragraph 10 of Findings of Fact (Tr. 13):

“According to the general custom of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by deducting one cent per pound for each one per cent the leaf and stem content exceeded eight per cent.”

This finding is challenged under this heading I, for the reason that it was probably intended to be interpreted to mean that hops having a leaf and stem content far in excess of eight per cent, such as eleven per cent, must be, by such custom, accepted by the buyer and that his only remedy is a reduction of the price.

This finding is clearly erroneous and is without any support whatever in the evidence. Furthermore, if such custom did exist, it has no application to this case.

The reasons for these conclusions will be briefly stated:

(a) Only one witness, Mr. Harold W. Ray, gave any testimony with respect to a custom of this sort (Tr. 178, 179, 197, 198). This is insufficient proof of custom under Oregon law, as Section 2-902, O.C.L.A., declares that usage must be proved by the testimony of at least two witnesses. That section provides:

“Usage, perjury and treason shall be proved by the testimony of more than one witness; usage by the testimony of at least two witnesses; * * * .”

Loland v. Nelson, 139 Or. 581, 8 Pac. 2d. 82.

(b) The only testimony relating to a custom of this sort was that it arose after September 1, 1946, when the O.P.A. price regulation ceased to be effective. Beginning in the 1944 growing season the so-called sliding scale had been imposed upon sellers and buyers alike by the price regulation covering hops, which could not have the effect of creating a custom such as is expressed in this finding. Certainly no such custom existed when this contract was executed on February 7, 1944 (Tr. 197, 198, 341).

It is well settled that evidence of usage and custom is admissible and may be given effect solely for the purpose of explaining the meaning of a term in a contract, on the theory that the parties are presumed to have contracted with reference to it.

Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 138 Pac. 862.

National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

In Oregon, of course, we have a statute in which this principle is incorporated, Section 2-228, O.C.L.A., which contains this language:

“In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:

“ * * * * *

“(12) Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation;

“ * * * * *.”

If the custom did not exist when the contract was executed, it can have no possible effect as an aid in the interpretation of the contract.

(c) The custom expressed in this finding is, by implication, contrary to the terms of the contract, as that instrument contains no provision whatever for a reduction in price in any contingency.

It has long been established that a custom or usage cannot be given effect if it is inconsistent with the contract of the parties. Furthermore, it is a sufficient ground for rejecting a custom that it is excluded by the contract by necessary implication.

Port Investment Co. v. Oregon Mutual Fire Ins. Co., 163 Or. 1, 94 Pac. 2d. 734.

In the present case the contract itself declares that when the grower has selected a contract price, that figure is the amount payable for the hops. If they are of contract grade, quality and condition and are accepted by the buyer the contract therefore excludes by implication any reduction in price based upon a sliding scale.

(d) The only witness who mentioned a custom of this sort testified that the sliding scale operated to give a buyer a premium when his leaf and stem content was less than eight per cent but did not have the effect of reducing the price when the leaf and stem content was greater than eight per cent (Tr. 178, 179).

(e) Mr. Ray, the witness referred to, also emphasized that the sliding scale could not under any circumstances be given effect to compel the acceptance of hops as of prime quality, which did not meet all the requirements of the contract with respect to grade, quality and condition (Tr. 178, 179).

One of these requirements is that the hops must be cleanly picked. In the present case, it is acknowledged by the plaintiff and his own witnesses that his hops were not cleanly picked (Tr. 152, 154, 155, 161). This was one of the conditions which prevented their classification as prime quality hops.

If the court construes the term "prime quality" to mean what the other expressions in the warranty specify, and to mean that the hops must be free of damage by mildew, it follows from what has been stated herein that the plaintiff has produced no evidence whatever

that his hops met the standards of quality and condition expressed in the contract of sale.

One additional finding should be challenged as it was intended to cast doubt upon the good faith of the defendant in rejecting the plaintiff's hops. That finding, in paragraph 16 (Tr. 15, 16), is in these words: " * * * there had been a material decline in the general market price and demand for 1947 Oregon late cluster hops; * * * ."

No evidence whatever was introduced in support of that finding. The market price of hops did not decline prior to the latter part of November, 1947. Mr. R. M. Walker, who was produced as a witness by the plaintiff in the Geschwill case, acknowledged that the market price of prime hops remained at 85 cents and 90 cents until the end of November, 1947 (Geschwill Tr. 246). Mr. Ray and other witnesses testified that there was a scarcity of prime quality hops in 1947 and that there was a good market for them throughout 1947 (Geschwill Tr. 362, 405, 470, 475, 476), and that the market price for hops of the type then available began to decline during the latter part of November (Exhibit 13, Tr. 53, 56; Exhibit 14, Tr. 53, 57) (Geschwill Tr. 246, 247; Geschwill Exhibit 33, Tr. 285).

The defendant respectfully contends that under these circumstances the findings discussed herein are clearly erroneous and should be set aside by reason of Rule 52 (a), Federal Rules of Civil Procedure, Title 28, U.S. C.A., following Section 723c, as it has been interpreted and applied in the cases relied upon in the Geschwill brief, page 40.

II

THE DEFENDANT WAS NOT BOUND TO TAKE DELIVERY OF THE PLAINTIFF'S HOPS AND WAS JUSTIFIED IN REJECTING THEM

Assuming that the conclusions stated in the argument under heading I are sound and that the hops tendered to the defendant did not meet the standards of grade, quality and condition specified in the contract of sale, the defendant was not bound to take delivery of such hops and was justified in rejecting them.

This is established by the decisions discussed in the Geschwill brief, pages 41 to 45. The argument therein is incorporated into this brief by reference.

III

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PLAINTIFF SUB- STANTIALLY PERFORMED ALL OF THE TERMS AND CONDITIONS OF THE CONTRACT ON HIS PART TO BE PERFORMED, AND THAT THE DEFENDANT WRONGFULLY REFUSED TO AND DID NOT PERFORM ITS OBLIGATION UNDER SAID CONTRACT

This is established by the argument under headings I and II, which is incorporated herein by reference.

IV

THE FINDING OF FACT THAT THE DEFENDANT ACCEPTED THE PLAINTIFF'S CLUSTER HOPS IS CLEARLY ERRONEOUS AND IS UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE, AND IS CONTRARY TO LAW

The entire paragraph in which this finding appears, paragraph 8 (Tr. 12), must be considered as it contains these three separate but related findings:

1. "At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops.
2. "The parties did not agree upon any change in or deviation from, and plaintiff did not waive, said established custom and usage.
3. "Defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff as aforesaid, * * * ."

1. The finding that it was an established usage and custom in the hop trade in Oregon that the weighing of hops by the buyer following an inspection constituted an acceptance of such hops.

The defendant contends that the supposed custom should not be given effect for these reasons:

(a) The evidence is insufficient to established that such custom or usage existed in Oregon.

Only two witnesses testified during the trial of this and the two preceding cases that a custom or usage existed by which the weighing of hops following an inspection of them constituted an acceptance of such hops: Mr. Kever and Mr. Glatt. These two men did not agree; in fact, there is considerable variance in their testimony.

It is necessary, at the outset, to point out that when the plaintiff's hops were sampled and weighed at the warehouse on September 25, 1947, the leaf and stem content had not been determined. In fact, the necessary samples of these hops were taken on that day and the results of that determination were not available to these parties until October 9, 1947, two weeks later (Exhibit 1, Tr. 53).

Mr. Kever testified that it is generally considered in the hop trade that the weighing of the hops is an acceptance of them. He said that this is true in spite of the fact that the leaf and stem content has not been determined when they are weighed and the percentage of leaves and stems might be shown by the official inspection to be very high (Tr. 134, 142, 143). On the other hand, Mr. Glatt testified that it is the general practice that weighing constitutes an acceptance providing that the parties have previously arrived at an agreement that those hops will be accepted at a certain price and providing that the general line of samples cut or tryings will meet the type samples (Tr. 126).

It is apparent, therefore, that only one witness, Mr. Kever, testified that by virtue of a custom or usage in the hop trade, weighing constituted an acceptance in spite of the fact that the leaf and stem content had not been determined. It is also apparent that while two witnesses testified that a custom does exist, their testimony is very different. Mr. Kever testified that weighing constitutes an acceptance in spite of the fact that the leaf and stem content has not been determined. Mr. Glatt testified that weighing constitutes an acceptance only when the parties have reached an agreement that the hops will be accepted at a certain price and the general line of samples cut or tryings will meet the type samples.

The defendant contends that under these circumstances it cannot be said that a custom or usage existed on September 25, 1947, that the weighing of hops constitutes an acceptance under any and all circumstances.

In the first place, the testimony of only one witness supports the custom stated in this finding. This is insufficient proof of custom or usage under Oregon law, as Section 2-902, O.C.L.A., declares that usage must be proved by the testimony of at least two witnesses.

Loland v. Nelson, 139 Or. 581, 8 Pac. 2d. 82.

Furthermore, the testimony of these two witnesses being at variance, it cannot be said that the custom is uniform or that it has been established with the requisite degree of certainty.

In *Port Investment Co. v. Oregon Mutual Fire Ins. Co.*, 163 Or. 1, 94 Pac. 2d. 734, the court made this statement:

“A custom or usage must be ancient, notorious, uniform, not opposed to a well settled rule of law, and not inconsistent with the contract of the parties.”

In *Sickelco v. Union Pacific R. Co.*, 111 Fed. 2d. 746, decided by this court, it was held that the plaintiff failed to meet the burden of proving the custom relied upon by him. The court said:

“We think the general doctrine is well put in 17 Corpus Juris, 451, Customs and Usages, Sec. 10, ‘* * * a usage or custom of trade must be certain and uniform in order to be binding. It is not sufficient that it is merely as certain as the nature of the business to which it applies will permit. Further, a loose and variable practice will not be allowed to control the rights of the parties, nor will an alleged usage which leaves some material element to the discretion of the individual.’

“And in the same volume of Corpus Juris, 453, Customs and Usages, Sec. 11, ‘A custom must be compulsory, and not left to each one’s option to obey it. Likewise, a usage, in order to be regarded as entering into a contract, must be clearly distinguished from mere acts of courtesy or accommodation.’

“This action was instituted originally in the California Superior Court; the contract set up by the plaintiff is alleged to have been entered into in California. We therefore look to the California law to determine what sort of custom or usage will control the rights of the parties. We find that the California courts recognize the requirements as to certainty and uniformity to establish a custom or usage.”

After considering the evidence, this court made the following statement:

“This evidence, taken at its full possible value, could not support a finding of a uniform custom or usage

to pay mechanical supervisors their full pay for periods of incapacity, regardless of the length of the period, as contended for by the plaintiff. We therefore hold that the trial court committed no error in directing a verdict as to plaintiff's first cause of action."

(b) If it could be said that the evidence does support the finding that a custom existed that weighing constituted an acceptance under all circumstances, there certainly is no evidence that such custom or usage is ancient or that, in fact, it existed when this contract was entered into on February 7, 1944, approximately five years before the trial of this case.

Evidence of usage and custom may be given effect solely for the purpose of explaining the meaning of a term in a contract on the theory that the parties presumably contracted with reference to it.

Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 138 P. 862.

National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

In Oregon, the principle that custom and usage may only be given effect to interpret an existing contract, is incorporated in a statute, Section 2-228, O.C.L.A., which provides:

"In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:

"* * * * *

“(12) Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation; * * * * .”

If the custom did not exist when the contract was executed, it can have no possible effect as an aid to the interpretation of the contract.

(c) The custom or usage set forth in the finding cannot be given effect and has no application to this case for the reason that the weighing did not follow an inspection of the hops.

The defendant contends that no inspection was made by it at or before the time the hops were weighed in the warehouse, for the reason that the employees of the defendant's Oregon representative, who sampled the hops at that time, had no authority to accept or reject them. What took place at the time of or just prior to the weighing was a sampling, rather than an inspection to determine whether the hops met the standards of grade, quality and condition specified in the contract.

Neither Mr. Ray who had been engaged in the hop business for 50 years nor any of his employees had any authority whatever to accept or reject the plaintiff's 1947 cluster hops, at the time of the weighing or at any other time during or after the 1947 season (Tr. 437, 447). The examination of the hops made by Mr. Ray's employees at the time of the weighing was for the purpose of sending representative samples to the principal office of the defendant in Washington, D. C., to enable the officers of the defendant to make the inspection and determine

whether such hops should be accepted or rejected. The examination made by Mr. Ray's employees at the time of the weighing had nothing to do with the acceptance or rejection of the hops other than the furnishing of representative samples to the defendant's officers. The decision then rested with the latter. They retained the sole authority in 1947 to decide whether or not a particular lot of hops should be accepted (Tr. 437, 447).

This discussion will be elaborated upon in the argument under subdivision 3 under this heading IV.

It follows from what has been said herein that the defendant did not "receive" the hops at the warehouse, and that the finding in paragraph 7 (Tr. 12) that it do so, is clearly erroneous as that term is interpreted in the cases cited in the Geschwill brief, page 40, if that finding is construed to mean that the defendant then accepted the hops or took possession of them. There is no evidence in support of that finding as so construed.

2. The finding that the parties did not agree upon any change in or deviation from, and the plaintiff did not waive, such custom and usage.

If the contentions made by the defendant in the argument of subdivision 1 under this heading IV are sound, there was no custom or usage that weighing constituted an acceptance, which was applicable to this case. If the court adopts the finding with respect to such custom and usage, however, it is acknowledged that there is some evidence that the parties did not agree upon any deviation from it.

3. The finding that the defendant accepted the plaintiff's hops.

The defendant contends that there was no acceptance of the hops when they were weighed, and that the finding that there was an acceptance is contrary to the uncontradicted evidence and the law.

It will be assumed in the argument under this subdivision 3 that the custom referred to in the finding considered under subdivision 1 of this heading IV, actually did exist when the hops were weighed.

The defendant contends that such custom and usage did not and could not apply to the transaction between these parties for the reason that no custom or usage can be given effect contrary to a rule of law, in this case the Uniform Sales Act and the decisions interpreting it.

It is established beyond any doubt, of course, that a custom contrary to a well settled rule of law cannot be given effect.

Port Investment Co. v. Oregon Mutual Fire Ins. Co., 163 Or. 1, 94 Pac. 2d. 734.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

Section 47 of the Uniform Sales Act, Section 71-147, O.C.L.A., declares that the plaintiff was bound to give the defendant a reasonable opportunity of examining the hops tendered at the warehouse for the purpose of ascertaining whether they were in conformity with the contract. The material portions of Section 47 of the Act are as follows:

“(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

“(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

“(3) * * * * *

The defendant contends that a reasonable opportunity of examining the hops for the purpose of ascertaining whether they were in conformity with the contract, under the existing circumstances, was one which gave the defendant's officers in Washington, D. C., a reasonable opportunity of examining the 10th bale samples of such hops which were known to be representative of the entire lot, in order that they could determine whether such hops were of contract grade, quality and condition. If this contention is sound, there could have been no acceptance when the hops were weighed, as the 10th bale samples, after it was found by Mr. Ray's employees that they were representative of the lot, still had to be sent to Mr. Ray's Hillsboro office and from there to Washington, D. C., and the defendant still had a reasonable opportunity of examining them, and still had to notify the plaintiff whether they were accepted or rejected.

It is entirely understandable, therefore, that this section has been construed to mean that if upon such

examination it appears that the hops so tendered were not of the grade, quality and condition described in the contract, the defendant was privileged to refuse to accept them, that is, to reject them. This is true although a conditional title may have passed to the defendant upon the delivery of the hops to the warehouse.

Kitterman v. Eagle Pine Co., 122 Or. 137, 257 Pac. 815.

Crosland v. Sloan, 123 Or. 243, 261 Pac. 701.

Olsen v. McMaken & Pentzien, 139 Neb. 506, 297 N.W. 830.

Hostler Coal & Lumber Co. v. Stuff, 205 Ia. 1341, 219 N.W. 481.

Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co., 233 Mich. 298, 206 N.W. 331.

The defendant contends that each of the subsections of Section 47 of the Act gave the defendant such reasonable opportunity of examining the hops. The two subsections will accordingly be separately considered.

Section 47(1) of the Uniform Sales Act

Section 47(1) of the Act, Section 71-147(1), O.C. L.A., was applicable to the situation existing on September 25, 1947, when these hops were sampled and weighed by the defendant in the warehouse. Consequently, there could be no acceptance on that occasion, nor until the defendant's officers communicated their decision to the plaintiff, and not then unless they informed him that the hops were acceptable.

Section 47(1) of the Act was applicable for these reasons:

(a) The defendant had not previously examined the hops, within the meaning of that subsection, that is, it had not examined the hops prior to the weighing of them.

In order that this may be demonstrated, it is necessary to consider certain facts. Neither Mr. Ray nor anyone in his organization in Oregon, had any authority whatever in 1947 to make the decision whether any particular lot of hops, including the plaintiff's, should be accepted or rejected (Tr. 437, 447). Mr. Ray sent to the defendant's office in Washington, D. C., prior to the delivery of the plaintiff's hops to the warehouse, four type samples, which were intended to indicate in a general way the probable quality of the entire lot of 193 bales. After the defendant had examined these type samples, it instructed Mr. Ray to take representative 10th bale samples, that is, a sample from approximately every 10th bale, and submit these to the defendant's office in Washington. Accordingly, 10th bale samples were taken after the delivery of the hops to the warehouse and, after these samples had been compared with the tryings, that is, a handful of hops from each bale, to make certain that the 10th bale samples were representative of the entire lot, these 19 samples, after being thus verified were sent to the defendant in Washington.

The defendant contends that the acts of Mr. Ray's employees at the warehouse, in drawing the 10th bale samples and the tryings and comparing both, with each

other and the type samples, did not constitute an examination of the hops for the purpose of ascertaining whether they were in conformity with the contract. These acts were in reality simply the preparation of representative samples in order that, from such samples, the defendant's officers in Washington might make the examination for the purpose of ascertaining whether the hops were in conformity with the contract.

The defendant contends that this is particularly true because the employees of Mr. Ray had no authority to ascertain whether the hops were in conformity with the contract. Their only authority was to make certain that the samples sent to the defendant were fairly representative of the entire lot. Inasmuch as the decision whether the hops were in conformity with the contract was required to be made and was made in Washington, D. C., that is where the examination was made which forms the basis for that decision.

The defendant's inspection of the four type samples cannot be regarded as a previous examination within the meaning of Section 47(1) of the Act for the reason that these were intended to be and were simply preliminary samples, sent to the defendant in Washington without any previous attempt to make certain that they were representative of the entire lot. In other words, these type samples were simply chosen from the bales at random and were not compared in any way with tryings from the bales.

(b) A reasonable opportunity of examining the hops for the purpose of ascertaining whether they were in

conformity with the contract was one which permitted the person or persons making the decision whether they did conform with the contract, to see and examine the 10th bale samples which had been previously compared with the tryings and found to be representative of the entire lot.

In view of the fact that the mildew attack in 1947 was the most severe that could be recalled, so far as damage to the cones themselves was concerned (Geschwill Tr. 426, 427) (Smith Tr. 256), it is entirely reasonable that the defendant should have insisted that the decision whether a particular lot of hops should be accepted, should be made by its officers in Washington.

It is equally reasonable, therefore, that the persons inspecting the hops and making the decision should have the best samples available. These were, of course, the 10th bale samples after they had been determined to be representative of the entire lot by a comparison with the tryings from the individual bales. The four type samples were clearly not the best samples available as no attempt was made before they were sent to Washington, to make certain that they were representative of the lot.

In conclusion, it should be stated that neither in this case nor in either of the two preceding cases, has the plaintiff contended that the defendant acted unreasonably in sending the 10th bale samples to the east, or that more than a reasonable length of time was required in the process of sampling in Oregon, and inspecting and making the decision in the east.

Section 47(2) of the Uniform Sales Act

Section 47(2) of the Act, Section 71-147(2), O.C. L.A., was applicable when the hops were tendered to the defendant in the warehouse for these reasons:

(a) The defendant impliedly requested that it be afforded a reasonable opportunity of examining the hops for the purpose of ascertaining whether they were in conformity with the contract. Such request may clearly be implied from the fact that Mr. Ray's employees took the 10th bale samples and compared them with the tryings, in the presence of the plaintiff in the warehouse. This implied request was, of course, for such inspection as was reasonable under the circumstances. What amounted to a reasonable inspection for the purpose of making the necessary decision, has already been considered in the previous subdivision under this heading IV.

(b) There was no agreement that an examination of the hops would not be permitted after they were weighed. The custom itself cannot have or be given the effect of creating an agreement where none existed by reason of the conduct of the parties, as the sole purpose of evidence of usage and custom is to explain the meaning of a term in a contract already existing.

Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 138 P. 862.

Smith v. Lofler, 137 Or. 230, 2 Pac. 2d. 181.

National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

Smith v. Lofler, supra, was subsequently overruled on a wholly different point.

In Oregon, the principle that custom and usage may only be given effect to interpret an existing contract, is incorporated in a statute, Section 2-228, O.C.L.A., which provides:

“In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:

“ * * * * *

“(12) Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation; * * * * *.”

In conclusion, Section 47 of the Act gave to the defendant the right to an inspection of 10th bale samples determined to be representative of the lot, in Washington, D. C. This naturally could not be accomplished before the weighing of the hops. Consequently, the custom that weighing constituted an acceptance under all circumstances, if found to exist, could not be given effect as it was clearly contrary to Section 47 of the Act and the decisions interpreting it.

Finally, there is no evidence whatever that the defendant accepted these hops, that is, that it intimated to the plaintiff that it accepted them, or performed any act in relation to them which was inconsistent with the ownership of the plaintiff.

Section 48 of the Act, Section 71-148, O.C.L.A., plainly implies that under such circumstances there was no acceptance. That section declares:

“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, * * * .”

It follows from what has been said under this heading IV, that the findings being considered are clearly erroneous as that term has been construed in the cases discussed in the Geschwill brief, page 40. These findings are also contrary to law.

It follows from what has been said herein that the defendant did not “inspect” or examine the hops at the warehouse on September 25, 1947, within the meaning of Section 47 of the Act, and that the finding in paragraph 7 (Tr. 12) that it did so, is clearly erroneous as that term is interpreted in the cases cited in the Geschwill brief, page 40. There is no evidence in support of such finding.

V

THE FINDING OF FACT THAT THE DEFENDANT DID NOT REJECT THE PLAINTIFF'S HOPS IS CLEARLY ERRONEOUS AND IS UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE, AND IS CONTRARY TO LAW

This finding is in paragraph 15 in these words (Tr. 15):

“Without rejecting said late cluster hops, defendant advised plaintiff in October, 1947, that it did not wish to take said hops.”

It is acknowledged in the plaintiff's complaint (Tr. 4) that the "defendant advised plaintiff in October, 1947, that it did not wish to take said hops," referring to the plaintiff's cluster hops.

The same assertion appears in two paragraphs of the Findings of Fact, 13 (Tr. 14) and 15 (Tr. 15).

It must be assumed, therefore, throughout the consideration of this case that such is the fact.

The defendant contends that the notification given to the plaintiff in October, 1947, that the defendant "did not wish to take said hops," coupled with the fact that the defendant declined to receive such hops or a warehouse receipt representing them, constitutes a rejection within the meaning of the Uniform Sales Act, and that the words in this finding which imply that there was no rejection are contrary to the established facts and the law, and are therefore wholly meaningless.

Section 50 of the Uniform Sales Act, Section 71-150, O.C.L.A., provides:

"Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them."

This section plainly declares that a buyer need not use the word "reject" when he refuses to take delivery of goods and pay for them, having the right to do so. All that he needs to do to assert his right to refuse to take delivery of the goods, is to refuse to accept them and notify the seller that he so refuses.

The word "accept" must, of course, receive its plain and ordinary meaning, there being nothing in the Act or in this case to require that it be given any different meaning.

Superior Oil Syndicate v. Handley, 99 Or. 146, 195 Pac. 159.

Cary v. Metropolitan Life Insurance Co., 141 Or. 388, 17 Pac. 2d. 1111.

The principal meaning of "accept" stated in Webster's New International Dictionary is: "To receive (a thing offered to or thrust upon one) with a consenting mind." The same authority declares that "receive" means: "to come into possession of, get, acquire, or the like, from any source outside of oneself or itself, without direct effort."

It is clear that the defendant did not receive the plaintiff's hops, nor a warehouse receipt or certificate of any kind representing them, as it did not come into possession of, get, or acquire either the hops or a warehouse receipt, with a consenting mind or otherwise (Tr. 105).

It is equally clear that the defendant did not accept the hops, and that when it declined to receive them or a receipt representing them, it refused to accept the hops themselves within the meaning of Section 50 of the Act, Section 71-150, O.C.L.A.

It is established, furthermore, that the defendant notified the plaintiff that it refused to accept the hops (Tr. 4, 14, 15). The allegation in the complaint (Tr. 4) and the two findings (Tr. 14, 15), can support no other

inference. A statement that one does not wish to do something, followed by his refusal to do it, certainly is a notice that he refuses to do it.

It is plain, therefore, that the defendant met both requirements imposed upon one seeking to refuse to take delivery of goods who has the right to do so: it refused to accept the goods and it so notified the plaintiff.

A refusal to accept goods, coupled with a notice of refusal, is colloquially and informally known as a rejection of them, particularly in the opinions in cases in which the right of inspection and refusal to accept is considered. This does not mean, however, that the word "reject" must be used in refusing to accept and in conveying a notice of refusal. The statute does not require that one who refuses to accept goods must notify the seller that he "rejects" them. The statute simply declares that the one refusing to accept goods must notify the seller that "he refuses to accept them."

Inasmuch as the conduct of the defendant in this case fully satisfies the statute, and is commonly characterized colloquially and informally as a rejection, the finding in this case that there was no rejection is contrary to the admitted and established facts and to the Uniform Sales Act.

The court found that the defendant notified the plaintiff that it did not wish to take said hops. The testimony which supports that finding was given by Mr. Noakes and Mr. Davis. Mr. Noakes testified that on October 28, 1947, he told the plaintiff that the defendant could not accept his cluster hops on the contract

because they did not make the grade (Tr. 292, 293). Mr. Davis testified that he heard Mr. Noakes tell the plaintiff, "We can't take those late hops, Otto" (Tr. 355). This finding that the defendant notified the plaintiff that it did not wish to take his hops, is an acceptance and adoption of the testimony of these two witnesses. Consequently, it must be said in this case that the defendant notified the plaintiff that it refused to accept his hops. Thus, by reason of what has already been said in the argument under this heading V, the finding that there was no rejection of the hops is meaningless and contrary to law, and should be disregarded. It must also be said that such finding is clearly erroneous as that term is construed in the cases cited in the Geschwill brief, page 40.

VI

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE FACTS OF THIS CASE DO NOT BRING IT WITHIN THE OPERATION OF THE PROVISIONS OF THE UNIFORM SALES ACT WHICH PERMIT SUCH AN ACTION

An action for the price can be maintained only when authorized by Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A. That section provides:

"(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and

the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

* * * * *

“(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer’s and may maintain an action for the price.”

The cases which support this proposition are cited in the Geschwill brief, pages 46 and 47.

Section 63(3) of the Uniform Sales Act

Section 63(3) of the Act, Section 71-163(3), O.C. L.A., does not authorize a recovery of the price in this action for the reason that there is not the slightest evidence in this case that the plaintiff notified the defendant that the hops would thereafter be held by the plaintiff as bailee for the defendant.

Under these circumstances, the argument under this subdivision of heading IV of the Geschwill brief, pages 47 and 48, establishes that there can be no recovery of the price under Section 63(3) of the Act. That argument, therefore, is incorporated herein by reference.

Section 63(1) of the Uniform Sales Act

Section 63(1) of the Act, Section 71-163(1), O.C.L. A., does not authorize a recovery of the price in this action for the reason that the property in the cluster hops referred to in the plaintiff's complaint has not passed to the defendant within the meaning of that section.

In the argument under this subdivision of heading IV of the Geschwill brief, pages 48 to 61, three detailed contentions are stated on pages 48 and 49.

The first of these has no application to the present case as the contract with which we are now concerned has no provision similar to that in the Geschwill contract. The second and third are retained, however, and, accordingly, the entire argument under this subdivision of heading IV of the Geschwill brief, pages 48 to 61, is incorporated herein by reference, with the exception of the argument under contention 1, pages 49 to 52, and all references made to that contention.

The two remaining contentions are repeated herein for the sake of clarity, under the numbers which they bear in the Geschwill brief:

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.
3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

The explanation of these contentions appearing in the Geschwill brief, page 49, is restated as follows:

An explanation of these two contentions is desirable. 2 is not dependent in any way upon a finding that the defendant was justified in rejecting the plaintiff's hops. This contention is operative if such rejection was wrongful. The acceptance of 2 is a sufficient basis for a reversal of this judgment and the entry of a judgment for the defendant. 3 is dependent upon a finding by this court that the defendant was justified in rejecting the plaintiff's hops, but 3 need not be considered if 2 is sustained. The acceptance of 3 is likewise a sufficient basis for a reversal of the judgment and the entry of a judgment for the defendant.

These two contentions are repeated herein as certain additional comments are necessary.

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.

The clause which governs the transaction in the present case, is as follows (Exhibit 1-A, Tr. 53):

“* * * upon delivery and acceptance of said hops the buyer will pay in current funds of the United States, or the equivalent thereof, the balance due on said hops * * * .”

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

One sentence in the Findings of Fact in the Geschwill case was challenged in that brief, pages 59 to 61.

A somewhat similar finding was made in the present case in paragraph 7 (Tr. 12), in these words:

“On September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties. At that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside.”

The defendant contends that this finding is not subject to the interpretation that the plaintiff appropriated the hops to the contract with the assent of the defendant. If the court concludes that the finding may be so construed, the defendant contends that it is clearly erroneous and unsupported by any substantial evidence, for the reasons stated in the argument under contention 3 in the Geschwill brief, pages 59 (bottom line) to 61.

The portion of this finding which declares that the plaintiff's hops were received and inspected by the defendant on September 25, 1947, at the warehouse, is challenged in the argument under heading IV.

If it should be determined by the court that the plaintiff is entitled to recover the price of his hops less the amount realized from the resale, the defendant contends that the findings of fact with respect to the price of the plaintiff's hops are clearly erroneous and should

be set aside and that the contract fixes the price at 45 cents per pound (Exhibit 1-A, Tr. 53).

The findings challenged are as follows:

1. Paragraph 9 of Findings of Fact (Tr. 13):

"Said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to defendant and which conformed to the prior practice between the parties."

2. Paragraph 11 of Findings of Fact (Tr. 14):

"The grower market price for said hops under said contract was 85 cents per pound net weight, less three cents per pound deduction for leaf and stem content as aforesaid * * *. The contract price for said hops was 82 cents per pound or a total of \$30,863.16."

The contract price for the hops was fixed in the contract at either 45 cents per pound or the market price on such date during a specified period in 1947 as the seller might elect (Exhibit 1-A, Tr. 53). The plaintiff on September 11, 1947, orally selected the then market price of 85 cents per pound for the cluster hops (Tr. 303). That selection, however, was not confirmed in writing as required by the contract (Tr. 71, 303; Exhibit 1-A, Tr. 53), although the defendant had issued express instructions that such requirement be complied with (Tr. 228), and had not authorized any departure therefrom (Tr. 217). Furthermore, there is no evidence in this transcript that the defendant knew that its instructions to secure the designation of price in writing had not been carried out in previous years.

The defendant contends, therefore, that these findings are clearly erroneous as that term has been construed in the cases discussed in the Geschwill brief, page 40.

VII

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PROPERTY IN THE PLAINTIFF'S CLUSTER HOPS PASSED TO THE DEFENDANT, AND THAT THE DEFENDANT BECAME OBLIGATED TO PAY AN AMOUNT CLAIMED TO BE THE PRICE OF THE HOPS UNDER SAID CONTRACT, LESS THE AMOUNT REALIZED FROM THE RESALE

This is established by the argument under heading VI, which is incorporated herein by reference.

VIII

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE CONTRACT ITSELF PRECLUDES THAT MEASURE OF RECOVERY

The provision concerning the measure of recovery in the contract we are considering in this case, is in these words (Exhibit 1-A, Tr. 53):

“* * * should the buyer fail to accept and pay for the hops herein agreed to be sold, the seller not being in default in the terms and conditions hereof

to be by the seller kept and performed, in the event the market value of the hops shall be less than the contract value, the seller shall be entitled to receive, as liquidated and ascertained damages for such breach on the part of the buyer, the difference in value between the market value of the kind, quality and quantity of hops in this contract mentioned at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified."

In view of the similarity between this language and that used in the comparable provision in the Geschwill contract, the argument in the brief filed in that case, pages 62 to 69, establishes in this case as well that the plaintiff is not entitled to maintain this action for the price, but is limited to the measure of damages so specified in the contract.

The court is referred particularly to *Daniels v. Morris*, 65 Or. 289, 130 Pac. 397, 132 Pac. 958, in which the clause in the contract was identical to that in the present case. The Supreme Court of Oregon held that the plaintiff was limited to the measure of recovery so specified in the contract.

This means in this case also that there can be no recovery by the plaintiff as the evidence is uncontradicted that the market value of such hops was no less than the contract price, whether the price is determined to be 45 cents, 82 cents or 85 cents (Tr. 225; Exhibits 13, 14, Tr. 53, 56, 57). Here again, however, this result imposes no undue hardship on the plaintiff, as he could have resold his hops readily, without any loss whatever, if they were of prime quality, at least until the latter part of November, 1947.

IX

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE MEASURE OF THE PLAINTIFF'S RECOVERY UPON THE FACTS HERE IS, UNDER OREGON LAW, THE DIFFERENCE BETWEEN THE AMOUNT DUE UNDER SAID CONTRACT AND THE AMOUNT REALIZED FROM THE RESALE

This is established by the argument under heading VIII, which is incorporated herein by reference.

CONCLUSION

It is desired that every reference herein to a portion of the Geschwill brief shall be regarded as an adoption of that portion by such reference.

The defendant respectfully prays that the judgment be reversed and that a judgment be rendered in favor of the defendant.

Respectfully submitted,

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United States
Court of Appeals
For the Ninth Circuit

JOHN I. HAAS, INC., a corporation,
Appellant,
vs.

O. L. WELLMAN,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court
for the District of Oregon.

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FILED

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United States
Court of Appeals
For the Ninth Circuit

JOHN I. HAAS, INC., a corporation,
Appellant,
vs.

O. L. WELLMAN,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court
for the District of Oregon.

STATEMENT OF THE CASE

This is an action to recover the balance due on the purchase price of one-half of a specific hop crop which defendant-appellant bought under contract from plaintiff-appellee.

The action was commenced in the Federal Court, which had jurisdiction under the statute which is now 28 U.S.C. §1332. The amount in controversy exceeds \$3,000, exclusive of interest and costs. The parties are citizens of different States in that plaintiff-appellee is a citizen of Oregon, and defendant-

appellant is a Delaware corporation. (Appendix, post, p. i.)

Both parties waived jury trial, and all issues were tried by the Court. The Court thereafter entered judgment for plaintiff-appellee, based upon findings of fact and conclusions of law (W.R. 8-18).

Consolidation of Records

This is a companion case to two others with which it was tried in the District Court and with which it is now on appeal to this Court, to-wit, Hugo V. Loewi, Inc., Appellant, vs. Geschwill, Appellee, No. 12440, and Hugo V. Loewi, Inc., Appellant, vs. Smith, Appellee, No. 12442. As indicated in appellee Geschwill's brief (pp. 2-3) and also in appellee Smith's brief (pp. 2-3) the Court has permitted a certain consolidation of the record and of the briefs in the three cases.¹

This case is like the other two in that it involves 1947 Oregon cluster hops, the background and practices of the hop trade that year, and similar matters. It is unlike the other two cases, however, in that it involves a different buyer-appellant, a term purchase contract rather than one made just before harvest, and a finding by the trial Court that the

¹ In order to avoid unwieldy references, the following abbreviations are used to refer to the various parts of the consolidated record:

G. R.—“Geschwill Record,” meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Geschwill, No. 12440.

S. R.—“Smith Record,” meaning that portion of the consolidated record printed in the case of Hugo V. Loewi, Inc. v. Smith, No. 12441.

W. R.—“Wellman Record,” meaning that portion of the consolidated record printed in the case of John I. Haas, Inc. v. Wellman, No. 12442.

hops were not only acceptable but were in fact accepted.

Pursuant to the Court's permission, and following appellant's example, we shall incorporate herein by reference certain portions from each of the appellees' briefs in the other two cases. This will leave for discussion in this brief just the particular core of the controversy about this particular case and hop crop.

Specifications of Asserted Error

Appellant's specifications of asserted error (Br. 20-32) differ in some material respects from the points designated by appellant as those upon which it would rely (W.R. 30-42). Several asserted errors have been added,² and several have been abandoned.³

Appellant did not bring up the whole record (W.R. 43-44), but the substantial omissions were in large part supplied by appellee's cross-designation (W.R. 46-47). We do not know whether the Court will feel at liberty to consider appellant's

² Two new specifications of asserted error, not mentioned in the designated points, appear as separate paragraphs Nos. 2 (Br. 20-21) and 32 (Br. 32).

The following specifications of asserted error question additional findings or parts of findings not mentioned in the designated points: Specification No. 5 (Br. 21-22) is an expansion of designated point No. 5 (W.R. 31); specification No. 6 (Br. 22) includes matter not in point No. 6 (W.R. 31); specification No. 12 (Br. 24-25) is an expansion of point No. 15 (W.R. 33); specification No. 15 (Br. 26) includes matter not mentioned in point No. 19 (W.R. 34); specification No. 18 (Br. 27) is an expansion of point No. 22 (W.R. 35); specifications Nos. 22 and 23 (Br. 29) are a division and expansion of point No. 26 (W.R. 36).

Specification No. 28 (Br. 31) seeks to correct point No. 32 (W.R. 37), and specification No. 31 (Br. 32) changes the statement in point No. 35 (W.R. 37).

³ The designated points on which appellant no longer relies are Nos. 2 in part, 3, 11, 12, 14, 28, 36 through 51.

newly-asserted errors.⁴ In order that the matter may be available for the Court's consideration, however, we shall discuss all of appellant's arguments including those which represent a change of position.

The first twenty-five of the thirty-two specifications of asserted error are directed to the findings of fact of the District Court. For the purpose of showing in an orderly form that they are supported by the evidence, the findings of fact are set out in their entirety in the Appendix to this brief with citations to the record on each contested point.

The Issues

Three "ultimate" issues are proposed by appellant (Br. 4):

(1) *Issue on acceptance of the hops.* In his memorandum of decision the trial Court stated (W.R. 8):

"I find that the buyer weighed the hops and 'took them in,' without imposing any conditions. By the custom of the trade, this constituted acceptance and makes the buyer liable for the contract price."

(And see findings of fact, and supporting evidence in Appendix, post, pp. xi-xxiv.)

⁴ Rule 75(d), Federal Rules of Civil Procedure, provides in part: "If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal." And see *Jesionowski v. Boston & Maine R. Co.*, 329 U.S. 452, 458-459, 67 S. Ct. 401, 91 L. Ed. 416; *Ritchie v. Drier*, App. D.C., 165 F. 2d 238, 240, cert. den. 334 U.S. 860, 68 S. Ct. 1518, 92 L. Ed. 1780; *Bennett v. Scofield*, 5 Cir., 170 F. 2d 887, 889.

Appellant denies the acceptance (Br. 47-66). Appellant claims that the evidence is not sufficient in quantity to prove the custom that weighing hops is acceptance, but appellant admits that if the custom is established there is evidence "that the parties did not agree upon any deviation from it" (Br. 53). Appellant also claims that the inspection, sampling, marking and weighing of the hops at the warehouse did not constitute an "inspection."

(2) *Issue on quality of the hops.* The trial Court found that the hops substantially conformed to the quality provisions of the contract (Appendix, post, pp. xxxiv-xxxvi).

Appellant claims that it rejected the hops and that they were not "prime quality" because of mildew and leaf-and-stem content (Br. 34-46).

(3) *Issue on form of action.* The trial Court decided (W.R. 17) that under Oregon law the measure of appellee's recovery upon the facts was the balance of the contract price, after deducting the advance payment and the proceeds on resale.

Appellant denies (upon the same grounds as in the Geschwill case) that the grower can recover the contract price in this action (Br. 66-74). Appellant also claims that the contract price should be deemed to be the minimum of 45 cents a pound, instead of the market price of 82 cents a pound as found by the trial Court, because the buyer's representative confirmed the selected market price orally rather than in writing (Br. 41-44).

Narrative Statement

We believe that the determinative facts are as found by the trial Court, and accordingly we differ widely with appellant's statement of the case. Most of the differences, however, appear in detail from the references to the supporting evidence set out in the Appendix hereto, and it does not seem necessary to reiterate here either the findings or the supporting evidence. Instead, without cataloging what we believe to be the inaccuracies in appellant's statement, we shall fill in some of the background relating to the ultimate issues. (This is in addition to the general material in appellee Geschwill's brief, pp. 5 et seq., and in appellee Smith's brief, pp. 12 et seq.)

The appellant buyer here, John I. Haas, Inc., is one of the large hop dealers in the country, and has its main office in the East. Its activities in Oregon include the operation of three hopyards, the buying of large quantities of hops from growers, and trading with other dealers. Mr. Ray personally supervises the operation of appellant's Oregon hopyards. In addition, Mr. Ray's corporation, A. J. Ray & Son, is the Oregon agent for appellant in buying hops, having represented appellant since about 1917 and having in recent years operated solely as appellant's representative.⁵ As Mr. Ray said, "we buy

⁵ Examples of the scope of the representation include the following: In W. Ex. 3-s appellant wrote the Ray company, "you, as our agent must point out the facts to the growers." In W. Ex. 3-f appellant telegraphed the Ray company, "you can fix prices" on contracts calling for a floor price or the market price, whichever was higher. In Ex. 3-c appellant wrote, "The matter of raising or lowering the amount [of advances] to any grower is a matter entirely in your hands." The Ray company does all the buying of hops in Oregon for

and contract hops for the defendant [appellant] in the State of Oregon and also look after the shipment of those hops." Advances to growers on hops contracted by appellant, and final payments for the hops purchased, are made to the growers by the Ray company and never directly by appellant. (W. R. 163-165, 188-189, 216, 218-220, 256, 383, 417, 442-443, 455-456, 460.)

The contract here was negotiated with Mr. Wellman for appellant by Mr. Noakes. Mr. Noakes is the vice-president of the Ray company, as well as a stockholder and director. At the time of trial he had been with the company for over thirty-six years and had been manager of its Salem office for twenty-one years. Mr. Wellman had dealt with Mr. Noakes representing appellant for some years, and all of Mr. Wellman's dealings under this series of contracts were with Mr. Noakes⁶ or his assistants, Mr. Davis and Mr. Troxel. (W.R. 59-62, 94, 121, 164, 276-277, 299-300, 312-313, 417; W. Ex. 1-A.)

In 1944 appellant contracted with Mr. Wellman for the purchase of one-half the salable crop of both fuggle and late cluster hops from his hopyard over a five-year period. A series of contracts, each

appellant (W.R. 219). Acting for appellant the Ray company negotiates hop contracts, makes spot purchases of hops, ships the hops purchased, examines hop crops under contract, makes advances to the growers, obtains and records the chattel mortgages on hop crops under contract, and inspects and samples hops (W.R. 220).

6 Mr. Noakes' functions included the buying, receiving, weighing, and shipping of hops, examination of the various yards under contract, issuing checks for and making advances to growers, making spot purchases, generally supervising the servicing of contracts, and issuing checks to growers in payment of their hops. (W.R. 276-277, 312-313, 417.)

relating to one year, were executed at that time, and the one involved here is for 1947. It shows "an equal quantity [the other one-half of the crop] sold to S. S. Steiner, Inc." Mr. Eismann, local manager for the Steiner company, explained the division of the crop between the two firms by saying, "We were both trying our best to buy the crop; at the time Mr. Wellman finally decided to split it." (W.R. 59-60, 299-300, 312, 383; W. Ex. 1-A.)

In 1947 Mr. Noakes found that the care and cultivation of Mr. Wellman's yard was "very good" (W. R. 300, and see 131, 358). However, the rainy weather in the late summer brought mildew to Mr. Wellman's yard just as it did to most of the hop-yards in the Willamette Valley (W.R. 340). Mr. Haas came out to Oregon at that time (W.R. 221), and appellant was fully advised of the situation (W.R. 340). Indeed, on August 14th the Ray company wrote appellant (W. Ex. 3-b) that in looking over Mr. Wellman's yard they were not hopeful of much of a cluster delivery and that it remained to be seen what happened "now that we are having hot weather."

With the better weather the condition of Mr. Wellman's cluster crop improved with respect to the mildew. "Some burrs in the yard made a second growth; some of the arms came out and produced hops" (W.R. 102). This improvement was generally true in the valley, particularly in such well-tended yards (G.R. 247, 265-266).

Part of Mr. Noakes' job was to make a survey of the yards on which appellant had contracts to see "what the crop would be" (W.R. 277). Mr. Noakes went through Mr. Wellman's cluster yard before picking,⁷ and found "there was considerable mildew all through the yard" and "there was only small sections that were reasonably free from infection" (W.R. 279). Mr. Noakes knew that where the mildew was general in the yard that way "it would show in the sample" (W.R. 318). Mr. Noakes told Mr. Wellman he thought the yard should be picked, and with Mr. Ray's approval made the picking advance (W.R. 175, 303, 407), which was duly reported to appellant (W. Ex. 3-d).

Because the crop was lighter, and because Mr. Wellman had some money on hand, they agreed upon a smaller picking advance than usual with the understanding that Mr. Wellman could have more if he needed it (W.R. 303, 398).

Because of the lack of picking machines in Oregon most of the growers were required to pick by

⁷ The contract (W. Ex. 1-A) provides in part: "* * * and provided further, that before, at or during the time of picking of said hops the Buyer shall have the right to examine the condition of the growing hops to determine whether the same are at such time in the condition in which they should be to produce the quality and/or quantity called for by the terms of this agreement; and should there be a dispute [arbitration is provided for]; and if it shall be determined that the growing crop is not in condition to produce the quality and/or quantity called for by this contract, then the Buyer shall be released from any obligation to furnish money as called for by this contract; * * *"

As the Oregon Court said of such a clause in the hop contract in *Livesley v. Johnston*, 45 Or. 30, 48, 76 Pac. 13, 946, 65 L.R.A. 783, 106 Am. St. Rep. 647: "It was not left to the mere option of Livesley & Co. [the buyer] to advance such funds as and when they saw fit, but they or their agent must pass an honest judgment as to whether or not the crop is in the proper condition; that is, for the production of such hops as is bargained for."

hand and there was a scarcity of good pickers. The result was that the picking was somewhat high in leaf-and-stem content. Thus, some of appellant's own clusters ran 10% leaf-and-stem content, Mr. Ray had a substantial quantity at 11% and some at 12%, and appellant in fact took clusters that year with 13% and 14%. Though the official analysis on Mr. Wellman's clusters (11%) was not then known, after harvest and before the acceptance Mr. Wellman and Mr. Noakes observed that the picking was somewhat "rough" and Mr. Wellman expected to take the standard market-price deduction of one cent a pound for each one per cent leaf-and-stem content over eight per cent. (W.R. 78-79, 113, 302, 344-345, and Appendix, post, pp. xxvi-xxx.)

Picking by hand, however, had one advantage in such a yard as Mr. Wellman's—the pickers could, and did, leave the badly mildewed arms and vines unpicked. Thus, a substantial quantity of the mildew was left in the yard, and the hops in the bales showed less mildew than they had on the vines.⁸ (W.R. 131-132, 403-404, and Appendix, post, pp. v-viii.)

In accordance with the contract and the practice of the parties in prior years, the hops were delivered at Mt. Angel, Oregon, in Schwab's warehouse, the

⁸ In appellant's brief (pp. 9-10) counsel refer to an estimated 64 bales, or about one-sixth of the crop, which it was not possible to harvest and bale separately. Those hops were from the hill yard and were less affected by mildew than some of the others. At first Mr. Wellman thought they could be kept separate from the others, but the baling crew could not keep up with the four picking sections and it was necessary to put the other kilns of hops on top of those in the storeroom. (W.R. 396-397, 408-409.)

only bonded warehouse in Mt. Angel. (W.R. 71, 75, 241-242, 305-306; G.R. 100, 344.)

About September 11th Mr. Wellman called Mr. Noakes on the telephone and selected the then market prices as the contract prices for his hops. They agreed that the market was 90 cents for fuggles and 85 cents on the sliding scale for clusters. In accordance with the established practice of the parties the buyer confirmed the selected prices orally rather than in writing. As Mr. Noakes testified (W.R. 304):

“Mr. Wellman asked if it was necessary to put it in writing, and I told him I didn’t think it was necessary; that we had not done it in previous years, and it would mean a trip back home or to Mt. Angel, and I said, ‘If that is okeh with you, it is all right with me.’ A good share of our business is done that way.”

Appellant authorized its agent to fix the price for clusters on such contracts at 85 cents on the sliding scale. Appellant was notified of the telephonic price selections, did not object to them, and eventually paid the price so selected for the fuggles. (W.R. 71, 177-178, 228-229, 303-304, 317; W. Exs. 3-f, 3-q; Appendix, post, pp. xxiv-xxix.)

Mr. Davis had sampled the clusters for appellant on three occasions, once when he was out to the yard inspecting the harvested hops in the dry-kiln and storeroom, once again at the farm, and then later after the hops were in the warehouse. Such samples were duly forwarded to appellant’s Eastern office, and Mr. Haas examined such a sample

in Mr. Ray's office, after harvest and before the acceptance at the warehouse.⁹ (W.R. 73-75, 349-350, 247; W. Ex. 3-e.)

Mr. Wellman ordinarily went hunting in the fall and he wanted to have the hops taken in so that he could get the hop business off his mind and go on a real hunting trip. Accordingly he asked Mr. Noakes to make his inspection, and Mr. Noakes arranged to do so (W.R. 306, 399).¹⁰

The inspection was made on September 25th and, even though he had two assistants, it took Mr. Noakes practically all day to inspect appellant's one-half of the crop. The warehousemen first lined the bales up and divided them equally between the platform on which Steiner's men were working and the platform on which appellant's men were work-

⁹ Appellant's evidence indicates that, as between the buyer and its agent, the buyer in the usual case would express its opinion of the hops on the basis of such samples (W.R. 234-235). Upon the full inspection, then, it was Mr. Noakes' job "to see that the crop ran and was like the type sample;" and, if he found that the tryings and tenth-bale samples measured up to the type sample, he weighed the hops (W.R. 325).

The Ray company was authorized to inspect hops tendered to appellant, Mr. Ray had Mr. Noakes make this inspection, and the hops were weighed at that time (W.R. 165, 311).

It appears that appellant and its agent wanted to deviate from the usual practice by inspecting, marking and weighing the bales without committing itself. Appellant now seems to contend that its wishes in this respect, even though not communicated to Mr. Wellman, are binding on him.

¹⁰ On trial appellant's principal contention seemed to be an affirmative defense that there was some agreement between Mr. Noakes and Mr. Wellman that the inspecting, marking and weighing of the hops would not constitute an acceptance in accordance with the trade custom. The Court found to the contrary. On brief (p. 53) appellant admits that if the custom is established, "it is acknowledged that there is some evidence that the parties did not agree upon any deviation from it;" and we understand that that issue is no longer in the case.

See the citations to the evidence collected in Appendix, post, pp. xix-xxii.

ing. The warehousemen's division of the bales was made in the usual manner and was acceptable to appellant.

The next step in the procedure was the examination of tryings from all the bales. As Mr. Noakes explained (W.R. 286-287):

“After the hops were lined up, we would go through them with triers and draw a sample handful out of each and every bale, and place that handful of hops on the head of the bale, and then later on we would bring a handful of the hops out to the doorway, to the light, and we would make a comparison between the tryings out of each bale with the type sample we had that was drawn previously.”

Appellant's inspectors also took larger samples from about one-tenth of the bales, which samples were selected to be representative of the crop, and which matched up with the type samples previously drawn.

The warehouse number was already on the bales when they started the inspection. While they were making the inspection, the Government representatives were also taking their samples for the leaf-and-stem analysis and marking the bales with the code number. As Mr. Noakes explained (W.R. 288):

“It is a code number used by the Department of Agriculture to identify each lot, each lot that they sample. The grower has a code number and if he has more than one lot they are classified by letters.”

Having inspected the hops, Mr. Noakes and his men then marked the respective bale number on the head of each bale, weighed the bales and prepared the weight slips. The inspecting, sampling, marking and weighing, which constitute all the acts normally incident to the inspection and acceptance of hops, were all done in the usual and customary manner.

By the custom of the trade the weighing of the bales, following such an inspection, is acceptance. Any bales which the buyer wishes to reject are set out and not marked with a number or weighed. None of Mr. Wellman's hops were so set out or rejected.¹¹

Since the hops were accepted, quality is not a real issue. However, it is interesting to note that Mr. Noakes, the chief inspector for appellant, found that they were large, flaky hops, filled with lupulin, and had quite a good flavor (W.R. 314). Mr. Davis, who assisted Mr. Noakes with the inspection, found that they were large, whole-berried hops, well filled with lupulin, and had a good flavor (W.R. 360). Even Mr. Ray, after seeing the samples, wrote appellant's Eastern office (W. Ex. 3-k), "Had these hops been cleanly picked, they would have made quite a decent sample." When the official analysis of the hops was received it showed 11% leaf-and-stem content, which was as good as or better than many lots of clusters taken

¹¹ The evidence supporting the statements in the last several paragraphs is cited in detail in the Appendix, post, pp. viii-xvii.

in by appellant that year, and which was compensated for by the reduction in price on the sliding scale basis. (Appendix, post, pp. xxvi-xxx.)

The hops having been received and weighed in, Mr. Wellman went on his hunting trip with a free mind. The price was not paid at that time because the amount depended upon the leaf-and-stem content and the sliding-scale feature of the market price. Under these conditions payment for the hops became due as soon as the official analysis was received. As Mr. Ray testified on direct examination (W.R. 417):

“Q. As a general practice, how soon after A. J. Ray & Son accept hops for the account of John I. Haas, Inc., does A. J. Ray & Son pay the grower for those hops?

A. After the inspection certificate has been issued and we know what the analysis is, immediately a check is given to the grower, but in case the inspection certificate has not been received we are forced to wait until it has been issued so that we know how to pay.”

Upon returning from hunting Mr. Wellman went to see Mr. Noakes who told him that closing the deal was being held up because the official analysis was not yet back, but that he expected it “most any time” (W.R. 400).

On October 10th appellant’s Eastern office decided, without seeing the tenth-bale samples, that it would take the fuggles but not the clusters, and instructed its local agent to pay only such balance

as might be due after deducting all advances from the price for the fuggles (W. Exs. 3-s, 3-r). Subsequently appellant's Eastern office instructed its Oregon agent that, after the fuggles had been taken and all the advances deducted, the clusters should be rejected, assigning as a reason that "the restrictions on brewers in the use of grain has changed the picture considerably" (W. Ex. 3-u).

On October 28th Mr. Noakes told Mr. Wellman that the returns had come through on the fuggles, that he could pay for them but that he was required to deduct all the advances from the price for the fuggles (W.R. 84-85, 323, 401-402). Mr. Wellman hesitated to settle for the fuggles alone, but Mr. Noakes told him they had not yet heard on the clusters and that settling for the fuggles would not affect the later settlement for the clusters (W.R. 84-85, 401).

There was no later settlement on the clusters. Appellant's representatives negotiated with Mr. Wellman about the matter over a period of several months. In the meantime Mr. Wellman had had a similar problem with S. S. Steiner, Inc., on the other one-half of the clusters. In the spring of 1948 the Steiner company settled with Mr. Wellman, and he had an opportunity to resell all the clusters for what was then the going price. Appellant consented to the resale and the proceeds thereof are credited against the contract price of the clusters in arriving at the judgment here. (W.R. 85-92, 371, 385, 388, and Appendix, post, pp. xxix-xli.)

SUMMARY OF ARGUMENT

Our argument is directed to the three "ultimate" issues proposed by appellant (Br. 4):

I. *Issue on acceptance.* The trial Court found that appellant in fact accepted the hops. The finding is fully supported by the evidence. (This is in answer to appellant's point IV, Br. pp. 33, 47-62.)

II. *Issue on quality of the hops.* The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence. (This is in answer to appellant's points I, II, III, V, Br. pp. 32-33, 34-46, 62-66.)

III. *Issue on form of action.* The hops having been accepted, the grower can maintain this action to recover the balance of the sales price. (This is in answer to appellant's points VI, VII, VIII, IX, Br. pp. 33-34, 66-74.)

I. ISSUE ON ACCEPTANCE

The trial Court found that appellant in fact accepted the hops. The finding is fully supported by the evidence.

The trial Court's findings of fact¹² include the following:

"At that time [in the warehouse on September 25, 1947] the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant [appellant], and

¹² "If the facts leave it in doubt whether there has been acceptance the determination of the question is for the jury." Williston on Sales, Rev. Ed., §483.

were identified, appropriated to the contract and set aside. * * *

“At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops. The parties did not agree upon any change in or deviation from, and plaintiff did not waive, said established custom and usage. Defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff [appellee] as aforesaid, * * *”

The findings are supported by the evidence (Appendix, post, pp. viii-xxiv).

Appellant has two principal objections to these findings: (a) The claim that the evidence is not sufficient in quantity to establish the custom; and, (b) the argument that the inspection, sampling, marking and weighing of the hops at the warehouse did not constitute an “inspection”.

A. Custom that weighing hops is acceptance.

(1) Quantum of evidence.

Counsel assert (Applt’s Br. 48): “Only two witnesses testified during the trial of this and the two preceding cases that a custom or usage existed by which the weighing of hops following an inspection of them constituted an acceptance of such

hops: Mr. Kever and Mr. Glatt.” It is then argued for appellant that the two witnesses did not use precisely the same wording in their testimony, and that therefore the statute requiring proof of usage by two witnesses was not satisfied.

In making this contention counsel have overlooked much of the record, including Mr. Geschwill’s testimony which counsel quoted in their statement of points to be relied upon (W.R. 40). Mr. Geschwill testified (G.R. 116) that as long as he had raised hops the custom was that inspecting and weighing-in was acceptance. “The ones they rejected, they naturally wouldn’t weigh them at all.”

Mr. Wellman testified (W.R. 83) that that was the only way he had ever sold hops.

Having been in the hop business since 1916 (W.R. 442), appellant would be presumed to have known of the custom. *Hurst v. Lake & Co.*, 146 Or. 500, 502, 31 P. 2d 168. Moreover, there is positive evidence that appellant was fully aware of the custom, and subsequently sought to avoid it with other growers. Thus, on September 25, 1947, appellant, wishing to make a change in the practice, telegraphed its Oregon agent (W. Ex. 5):

“Suggest all contract [growers] * * * be notified by letter that inspection sampling and weighing does not constitute acceptance and that decision this question by home office will be communicated to grower later so no misunderstanding such inspection etc. can arise.”

Upon receipt of that telegram Mr. Ray said (W.R. 230-231):

“* * * I drafted a letter [W. Ex. 12], which was typed and sent to all contract growers, and I told them not to send it to Mr. Wellman because they were inspecting and weighing and sampling Mr. Wellman’s hops that very day.”

Mr. Noakes admitted of the new method, “It is probably a procedure that deviates from the usual custom” (W.R. 327). Mr. Haas testified (W.R. 469):

“* * * we have changed that and we are currently, as for example this past season in Yakima where they had as you know wind damage there to hops—we stamp on all of our weight sheets that it does not constitute acceptance of the hops; * * *”

(Compare also appellee Geschwill’s brief, pp. 14-15).

It is submitted that there is more than sufficient quantum of proof in the foregoing testimony of Mr. Geschwill and Mr. Wellman, and the admissions of appellant’s witnesses, together with the testimony of Mr. Keber and Mr. Glatt to which counsel refer (Applt’s Br. 48-49; W.R. 126, 134, 138, 422-423; and Appendix, post, pp. xv-xvii).

The custom is in harmony with the legal obligation of the buyer to attend, at the time and place the goods are tendered for delivery, in order to inspect the same and then either accept them or specify any objection he may have to them. Compare *Catlin v. Jones*, 48 Or. 158, 85 Pac. 515; *Seiden-*

berg v. Tautfest, 155 Or. 420, 64 P. 2d 534; §§71-141¹³ and 72-103, O.C.L.A.¹⁴

The buyer is deemed to have accepted the goods either where he intimates to the seller that he has done so, or where he exercises dominion over them. §71-148, O.C.L.A.;¹⁵ Williston on Sales, Rev. Ed. §483. Here appellant at the time of tender did not reject any bale, marked all of them with bale numbers, and did all the acts which are customarily incident to and constitute inspection and acceptance.

(2) *Duration of custom.*

Counsel assert (Applt's Br. 51) "there certainly is no evidence that such custom or usage [of weighing being acceptance] is ancient or that, in fact, it existed when this contract was entered into on February 7, 1944, approximately five years before the trial of this case."

Mr. Keber had been familiar with the hop business for "at least thirty-five years" (W.R. 130) and he had "always understood" that to be the custom

13 §71-141, O.C.L.A.: "It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale."

14 §72-103, O.C.L.A.: "The person to whom a tender is made shall at the time specify any objection he may have to the * * * property, or he must be deemed to have waived it; * * *"

"Regardless of what may be the rule in other jurisdictions, it was incumbent upon the plaintiff, under the statute of this state, to specify its objections to the hops at the time delivery was tendered." *Seidenberg v. Taufest*, *supra*, 155 Or. at 424.

15 "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

(W.R. 134). Mr. Wellman had been in the hop business “since 1930” (W.R. 58) and he said “that is the only way I have ever sold hops” (W.R. 83). Mr. Noakes had been with the Ray company in the hop business “for 36 years” (W.R. 276), and he admitted that the new method proposed by appellant “is probably a procedure that deviates from the usual custom” (W.R. 327). Mr. Glatt testified to the general custom (W.R. 126) from his experience in the hop business of “about twenty years” (W.R. 120). Mr. Geschwill “had experience about 10 or 12 years in hops” (G.R. 70), and he had been growing his own since 1943 (G.R. 71). He said such was the custom “as long as I raised hops” (G.R. 116).

(3) *Uniformity of custom.*

Counsel say (Applt’s Br. 48-49) that there is a variance between the testimony on the following ground:

Mr. Keber said that where weighing the hops preceded the receipt of the official leaf-and-stem analysis such weighing was acceptance—“That is done right along” (W.R. 143).

Mr. Glatt said that weighing is acceptance where the parties have agreed on the price and where on inspection the tryings and samples meet the type samples (W.R. 126).

It is obvious from the record that all the witnesses who testified on the subject, including both the witnesses whose testimony counsel refer to and also the others, spoke with reference to a situation

where there was an agreement to sell at a fixed price or the market price, and where the usual inspection preceded the weighing. The witnesses merely used different words in uniformly testifying to the same fact; the claimed variance does not exist.

The leaf-and-stem content of hops is apparent both from the type samples and from the tryings and the tenth-bale samples taken at the time of the inspection in the warehouse. The precise percentage of leaf-and-stem content subsequently shown by the official analysis is used in computing the sliding-scale premium or discount on the market price. Appellant's argument seems to be that the market price is not sufficiently certain to permit acceptance until the premium or discount is finally computed.

It is undisputed on the record that the acceptance of hops is not delayed pending the receipt of the official analysis, but that payment for the hops after they have been accepted is held up until the official certificate is received and the sliding-scale premium or discount is known.¹⁶ Such is the testimony of Mr. Ray (W.R. 417), Mr. Keber (W.R. 142-143), Mr. Wellman (W.R. 411-412), and Mr. Smith (W.R. 429-430).

¹⁶ The practice of the parties and of the trade in this respect is well-founded in law.

"* * * in an executory contract to sell, or in a sale, the parties may provide for some means of determining the price later by outside circumstances." Williston on Sales, Rev. Ed., §167.

Formerly there was a presumption, applied in the absence of facts showing a contrary intent, that parties did not intend the property in the goods to pass where weighing or measuring remained to be done by the *seller* to ascertain the price, but there is no such pre-

B. Inspection of the hops at the warehouse.

Appellant contends that the custom of weighing being acceptance is not applicable here because there was no inspection at the warehouse. In support of this it is claimed (1) that appellant's agent had no authority to inspect and accept (Br. 52-53, 57), and (2) that the customary inspection at the warehouse did not give appellant a reasonable opportunity to examine the hops (Br. 54-62).

(1) Authority of agent.

Appellant contends (Br. 52) that there was no inspection at the warehouse because "the employees of the defendant's [appellant's] Oregon representative, who sampled the hops at that time, had no authority to accept or reject them."

It is easy now for appellant to seek to disown its Oregon agent, the Ray company, and Mr. Noakes, the vice-president and Salem manager who exercised the authority of the corporate agent. It would have been equally easy for appellant to insist upon the authority of its Oregon agent had the market for hops gone up.

The record is clear that the agent had actual authority (ante, pp. 6-7). Appellant claims it sought to change and restrict its agent's authority by adopting a new procedure. The record shows

sumption now under the Uniform Sales Act. Williston on Sales, Rev. Ed., §§266-269; *Cownie v. Local Board of Review*, 235 Iowa 318, 16 N.W. 2d 592, 597. Even if there were such a presumption it would not be applicable here for each of several reasons: Nothing remained to be done by the seller; the computation related merely to premium or discount on an established market price; the hops were in fact accepted.

not only that Mr. Wellman knew nothing of the change, but even that the change was sought to be made after his hops were being taken in.

The letter of September 16th (W. Ex. 18) from appellant's Eastern office to its Oregon agent says nothing about weighing-in but speaks of sending a line of samples to the Eastern office to show customers. This could have been accomplished by sending more of the preliminary "type" or "inspection" samples (W.R. 469-470).¹⁷

On September 24th the Eastern office telegraphed the Oregon agent (W. Ex. 3-g): "On questionable lots require tenth bale samples and time to submit samples our customers." On that day appellant took in a crop of clusters which showed mildew and had 14% leaf-and-stem content (W.R. 329-330; W. Ex. 17, pp. 8-9). Apparently that lot was not considered questionable.

Appellant claims that Mr. Wellman's crop on the following day, September 25th, was the first handled under the new method (W.R. 330). On that day appellant *suggested* (W. Ex. 5) to its Oregon agent that a letter be sent each grower saying that inspection and weighing would not be considered acceptance. No such letter was sent Mr. Wellman "because they were inspecting and weighing and sampling Mr. Wellman's hops that very day" (W.R. 230-231).

¹⁷ The hop purchase contract here was mutually binding, and not a mere option on the part of appellant to accept and pay for the hops only in the event that it had first resold them. There was nothing to put the grower on notice that appellant regarded its contract as such an option.

In any event, however, the agent clearly had apparent authority. The grower is not bound by the appellant's secret instructions to, or undisclosed changes in the authority of, the Oregon agent.

"Proof of the authority of the agent may be made by the course of dealing between the parties. It is not necessary for the latter [i.e., the grower here] to prove that the principal conferred, either in writing or orally, specific authority, if the conduct of the agent is within the scope of his authority as disclosed by the conduct of the parties. One dealing with a corporation must deal with its agents. He has a right to rely upon the apparent scope of the agent's power." *Carstens Packing Co. v. Gross*, 131 Or. 580, 584, 283 Pac. 20.

"The authority of an agent to bind his principal in contracts made with a third party is measured, not only by the agent's express delegation of power, but also by that which he is held out by the principal as possessing, provided, however, the third party had reason to believe and did believe the agent was acting within and not exceeding his authority, and such party would sustain a loss if the contract was not regarded as that of the principal." *Nicholas v. Title & Trust Co.*, 79 Or. 226, 238, 154 Pac. 391.

In past years Mr. Noakes had bought and paid for spot purchases of Mr. Wellman's hops for appellant. Mr. Noakes had negotiated this series of contracts for appellant with Mr. Wellman, and had prepared the contracts himself. All of Mr. Well-

man's dealings under the series of contracts were with Mr. Noakes, or his assistants, representing appellant. Mr. Noakes had authority to inspect hops tendered on appellant's contracts and to issue checks to the growers in payment for such hops. In prior years under this series of contracts Mr. Noakes had inspected and weighed in Mr. Wellman's hops and thereby accepted them for appellant. The evidence indicates that Mr. Noakes had actual authority, but in any event he had apparent authority again in 1947 to weigh in and thereby accept Mr. Wellman's crop for appellant; and he did so. (W.R. 59, 61-62, 121, 164-165, 248, 276-277, 299-300, 312-313, 417.)

(2) *Appellant's proposed method of inspection.*

Appellant contends (Br. 54-62) that the inspecting, sampling, marking and weighing of the hops at the warehouse was only a "sampling", and that inspection of the tenth-bale samples at the Eastern office would have been the only reasonable method and place for inspection of the crop.

The argument is without basis in the record.

(a) Appellant did not in fact follow its suggested procedure. Without even seeing the tenth-bale samples, its Eastern office decided it wanted the fuggles and probably did not want the clusters. (Appendix, post, pp. xxii-xxiv.) The inference is permissible that in fact appellant suggested the new procedure in order to have time to see the effect on its resale market of the grain restrictions on

brewers and of the unexpected Oregon hop production. (Compare appellee Geschwill's brief, p. 11, n. 11, and Appendix thereto, pp. xiii-xiv.)

(b) The evidence indicates that appellant did not seek to put its new method into effect until after Mr. Wellman's hops had been accepted (ante, p. 25).

(c) The suggested procedure would have been a deviation from the contract. The inspection at the warehouse was such an inspection as was customarily incident to acceptance. (Appendix, post, pp. xi-xvii.) The parties contracted in contemplation of such an inspection and acceptance.¹⁸

(d) According to appellant's inspector the tenth-bale samples conformed to the type samples which appellant had had for some time (W.R. 286-287, 308-311). If the examination were to be limited to a few samples, appellant could ascertain as much from a few type samples as from a few tenth-bale samples.

(e) Contrary to appellant's argument (Br. 60) the taking of the tenth-bale samples was not an implied request that further inspection of those samples be permitted by the Eastern office. Tenth-bale samples are always taken during the regular inspection at the warehouse as "a part of the pro-

¹⁸ The proposed procedure would in effect change the contract from one for sale of a specific hop crop to one for some sort of sale by sample. Ordinarily in a sale by sample the sample is approved by the buyer and then the hops are examined to see if they meet it. By appellant's method the sample would be selected as representative and then the buyer would decide whether to approve the sample.

cess of determining the quality and condition of the hops" (Mr. Ray, W.R. 436). The tryings may be broken up and the larger samples show the wholeness and flaky condition of the hops. After the weighing-in, the tenth bale samples, or splits of them, always go to the buyer's office for such use as he may have for them as representing the hops he has purchased. Before the new procedure was attempted in 1947 it had never been the practice to condition acceptance upon approval of such samples. (W.R. 418-438.)

(f) The place of inspection is the place of delivery, which the contract here specified to be Mt. Angel, Oregon. Williston on Sales, Rev. Ed., §480. The buyer had a reasonable opportunity to, and did, inspect the hops in warehouse at Mt. Angel where they were tendered for delivery, and the trial Court found that in fact appellant accepted the hops.

It is submitted that appellant's argument that the only reasonable place and method of inspection was at its Eastern office by an examination of a few samples is not warranted by the contract, is not supported by the evidence, is founded solely upon the buyer's convenience, and disregards the buyer's reciprocal obligations to the grower.

II. ISSUE ON QUALITY OF THE HOPS

The trial Court found that the hops upon tender and delivery substantially conformed to the quality provisions of the contract. The finding is clearly supported by the evidence.

Since the hops were accepted, we do not regard quality as an issue. However, appellant argues (Br. 34-41, 46) that the hops were not of “prime quality” and (Br. 62-66) that it rejected them. Appellant also argues under this heading (Br. 41-45) that the market price was not computed on the sliding scale basis for leaf-and-stem content.

A. The quality of the hops.

The trial Court’s findings are set out in the Appendix, post, p. xxxiv, and see also pp. v-viii, xxxi-xxxiv, xxxv-xxxix.

Mr. Keber (W.R. 138), Mr. Schlottman (W.R. 159), and Mr. Willig (W.R. 152-153), who were all experienced in the hop business, testified that these hops were of the same character and quality of hops which were accepted in the trade under this type of contract.

Appellant’s witnesses criticized the hops because they showed mildew and leaf-and-stem content (Applt’s Br. 14-16). Those witnesses included:

Mr. Haas, vice-president of appellant, who did not know that appellant’s contracts with growers call for only “prime” hops (W.R. 457-459), and who testified that appellant sold its own hops to breweries when the hops showed

mildew and 10% leaf-and-stem content (W.R. 455; W. Ex. 17).

Mr. Ray, who thought that hops to be prime could not show any mildew nor more than 6% leaf-and-stem content (W.R. 241-242), but who that year sold to appellant 588 bales of his own cluster hops showing mildew and 11% leaf-and-stem content, and 114 bales of his own cluster hops showing mildew and 12% leaf-and-stem content, which hops appellant resold to breweries (W.R. 456-457; W. Ex. 17, pp. 6-7).

Mr. Eismann, Oregon manager for another dealer-litigant (W.R. 384-385).

Mr. Franklin, who "didn't see a Willamette Valley hop in 1947" (G.R. 495).

The inspectors, Mr. Noakes and Mr. Davis, who actually saw the hops in the field and in the bales, also spoke of the mildew and the leaf-and-stem content, but in addition they testified that the hops were large and flaky, were well-filled with lupulin, and had a good flavor (W.R. 314, 360). Mr. Ray when he saw the fresh samples in 1947 was of the same opinion (W. Ex. 3-k).

Appellant's arguments against the Court's findings of fact on this point follow closely the arguments of the appellant in the Geschwill case, and accordingly we incorporate here by this reference the material appearing in appellee Geschwill's brief, pp. 19-45.

B. The hops were not rejected.

Appellant claims (Br. 62-66) that it rejected the hops and specified its grounds therefor, not when tender was made at the warehouse, but a month later in the conversation between Mr. Noakes and Mr. Wellman on October 28, 1947.

Since the hops had previously been accepted, the subsequent purported rejection would have been ineffective.

Under the Oregon statute it was incumbent upon the buyer to specify its objections, if any, to the hops at the time delivery was tendered, or any such objections would be deemed to have been waived. (See ante, p. 21, note 14.)

As to the purported rejection on October 28th, the evidence can be summarized as follows:¹⁹

Mr. Wellman (W.R. 85): "There wasn't a word of rejection mentioned."

Mr. Noakes (W.R. 320): "I said we did not accept them" (meaning that the returns had not yet come in from the Eastern office?).

Mr. Davis (W.R. 355): "Mr. Noakes turned to Mr. Wellman and he said, 'We can't take those late hops, Otto'" (meaning not yet?).

¹⁹ In connection with the purported rejection, counsel say (Appl't's Br. 63), "the defendant declined to receive such hops or a warehouse receipt representing them." The evidence is that the warehouse receipt is only turned over when payment is made, that the warehouse receipt for the clusters was not actually issued until they were resold, and that neither the warehouse receipt nor the load checks were either proffered to or requested by appellant (W.R. 104-106, 210-211, 315).

"He [the hop grower] was not obliged to turn over his warehouse receipts before receiving payment." *Seidenberg v. Tautfest*, supra, 155 Or. at 426.

Mr. Ray continued thereafter to talk of appellant's "moral obligation" to Mr. Wellman (Appendix, post, pp. xxxix-xli; W.R. 210).

As to the failure to specify any objections, the evidence may be summarized as follows:

Mr. Davis (W.R. 357): "I don't recall that he [Mr. Noakes] said we cannot accept them for any certain reason, no. * * * I don't recall that he came right out and gave a reason for not taking them."

Mr. Noakes (W.R. 321): "I just said they were not acceptable. * * * I was assuming that he [Mr. Wellman] knew the condition of the hops."

Mr. Wellman (W.R. 401): "Before I took the check [for the fuggle price less all advances], I asked Mr. Noakes, I said, 'Will this have any bearing on the settlement of the lates, paying for the lates?' And Mr. Noakes said, 'Not whatsoever.'"

Appellant's instructions were to take the fuggles, pay the small balance after deducting all advances, and then after that was done to reject the clusters (W. Exs. 3-r, 3-s, 3-u).

The Court's finding is that appellant did not then specify any particular objection it may have had to the hops (Appendix, post, xxxi).

C. Computation of market price.

The trial Court found (Appendix, post, pp. xxvi, xxx):

"According to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compen-

sated for, and the grower market price was computed, by deducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent. * * *

“The grower market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid. * * *”

(1) Appellant's objection to validity of sliding scale feature of 1947 market price.

The custom referred to in the Court's finding relates to the 1947 market price, and not to a provision in the 1944 contract. Appellant argues (Br. 42-44) that the market price in 1947 must be determined upon factors known to and contemplated by the parties in 1944 when the contract was executed.²⁰ Upon such an argument most market price contracts for extended terms would be invalidated.

The contract (W. Ex. 1-A) provides in part:

“It is agreed and understood that the price to be paid by the Buyer * * * shall be the Federal Grower Ceiling Price * * *

“In the event that no Federal price regulation is established and in effect covering 1947 crop Oregon hops, the price to be paid by the Buyer to the Seller for the hops covered by this contract shall be either Forty five cents (45c) per pound or the Grower market price whichever is the higher * * *”

²⁰ The sliding scale first came into use in computing the ceiling price on the 1944 crop, and was applied by the parties under this series of contracts. (W.R. 63; Appendix, post, pp. xxvii-xxviii.)

Appellant does not challenge the findings that there was no Federal price regulation in effect covering the 1947 crop of Oregon hops, and that "the price to be paid by the defendant buyer for said late cluster hops under said contract was the grower market price for such Oregon hops * * *" (Appendix, post, p. xxiv).

The parties obviously contemplated that the ceiling prices in effect in 1944 might not apply in 1947, and that in such event the grower was to have the benefit of the then market price, however that market price might be arrived at or computed.

"To constitute a sale, the price need not be definitely fixed at the time the sale is effected, if the agreement contains express or implied provisions by which it may be rendered certain: [citation]. There could be no uncertainty as to defendant's market price * * *. The contract expressly provides that the price to plaintiff should be four cents per gallon less than that." *Moore v. Shell Oil Co.*, 139 Or. 72, 79-80, 6 P. 2d 216.

"* * * in an executory contract to sell, or in a sale, the parties may provide for some means of determining the price later by outside circumstances." Williston on Sales, Rev. Ed., §167.

" 'Current market price,' in a case of this kind, means that the contract price shall run or flow with the market, following its fluctuations." *Ford v. Norton*, 32 N.M. 518, 260 Pac. 411, 55 A.L.R. 261, 267.

(2) *Appellant's objection to proof of sliding scale feature of market price.*

Counsel say (Applt's Br. 42): "Only one witness, Mr. Harold W. Ray, gave any testimony with respect to a custom of this sort * * * This is insufficient proof * * *"

Counsel have overlooked the testimony of appellant's other witnesses. For example, appellant's witness Mr. Eismann, the manager for the large hop concern of S. S. Steiner, Inc., said (W.R. 387):

"Q. Did the Steiner corporation recognize this sliding scale in 1947?

A. We did, uniformly throughout."

Again, appellant's witness Mr. Noakes testified that the sliding scale was applied in determining the market price under such contracts as this "because that was the procedure or the custom in the market in that year" (W.R. 317).

Appellant itself instructed its agent to fix the price for clusters at 85 cents on the sliding scale, and to apply the penalties on picking (W. Ex. 3-f; W.R. 250-251).

Mr. Wellman considered that the price to be paid for his 1947 clusters was "85 cents less a cent for each pound over eight per cent pick, and a premium for under" (W.R. 113).

The testimony supporting the finding is set out in some detail in the Appendix, post, pp. xxvi-xxix.

In addition, there is evidence of specific transactions. The picking discount was applied in Mr. Glatt's case (W.R. 128, 129), and in the other particular instances mentioned by Mr. Ray (W.R. 235-240).

Appellant took in a large quantity of cluster hops in 1947 which ran from 10% through 14% leaf-and-stem content, and appellant's practice in applying the standard market-price deduction for leaf-and-stem content seems only reasonable (Appendix, post, v, xix, xxxiii).

III. ISSUE ON FORM OF ACTION

The hops having been accepted, the grower can maintain this action to recover the balance of the sales price.

Since the hops were accepted, there is no real issue on this point. Appellant has, however, repeated the same argument used by the appellant in the Geschwill case, and accordingly we incorporate here by this reference the material in appellee Geschwill's brief, pp. 46-75.

(1) Appellant's objection to its agent's oral confirmation of the market price selected by the grower.

Appellant contends (Br. 3-4, 24, 73) that the action of its agent in confirming orally the price selected by the grower, rather than in writing, deprives the grower of that market price and relegates him to the much lower floor price of 45 cents a pound. It is not disputed that the market price selected was the actual market price, and that appellant did not

at any time before trial object to the telephonic confirmation. Appellant contends (Br. 3-4), however, that it had issued instructions to its agent to confirm in writing and if its agent did not comply therewith the grower must suffer.

The contractual provision and Mr. Noakes' testimony as to his oral confirmation are quoted in the Appendix, post, xxv-xxvi.

(a) The written confirmation contemplated by the contract is only evidence of the price selection, and the fact that such evidence was not reduced to writing does not defeat the selection which in fact was made.

“‘To confirm’ as here used is defined by Webster’s Dictionary as follows: ‘To give new assurance of the truth of, to render certain, to verify, to corroborate’—and to confirm the purchase must of necessity mean that the purchase had theretofore been made, and the letter was simply a written memorandum thereof confirming the same, * * *” *Horner v. Daily*, 77 Ind. App. 378, 133 N.E. 585, 586.

(b) Mr. Noakes had at least apparent authority, and probably actual authority, to confirm the selection orally. Mr. Ray testified that under this series of contracts there had never been a written confirmation of the selected price, he believed that appellant had told him it wanted such confirmations in writing, but it had never refused to recognize a telephonic confirmation. (W.R. 228-229; and see W.R. 303-304.)

CONCLUSION

We respectfully submit that the trial Court's findings are clearly supported by the facts, that the Court's conclusions are sound in law, and that the findings and conclusions support the judgment.

Respectfully submitted,

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August 19, 1950.

APPENDIX A

Explanatory Note: This appendix consists of the trial Court's findings of fact (W.R. 9-16), references to appellant's specifications of asserted error (Br. 20-30), and citations to the supporting evidence. The portions of the findings which are questioned by appellant are printed in italics, and the number following each italicized portion corresponds to the number of appellant's asserted error relating thereto.

Finding "1. At the time of the commencement of this action and at all times herein mentioned plaintiff was and is a citizen of the State of Oregon and defendant was and is a corporation incorporated and existing under the laws of, and a citizen of, the State of Delaware."

Asserted error: None.

Finding "2. The amount in controversy herein exceeds, exclusive of interest and costs, the sum of \$3,000; and this Court has jurisdiction of the subject matter, the parties and the cause of action."

Asserted error: None.

Finding "3. On or about February 7, 1944, plaintiff, as seller, and defendant, as buyer, entered into the 1947 'hop contract' received in evidence herein, which contract was one of a series of similar contracts entered into between the parties at the same time relating to hop crops for several successive years. *By said contract it was agreed that plaintiff would sell and defendant would buy one-half of the*

*salable crop of fuggle and late cluster hops grown by plaintiff on a certain farm in Clackamas County, Oregon, in 1947.*¹ There is no controversy here concerning the fuggle hops which were in 1947 grown by plaintiff and accepted by defendant. *The one-half of the 1947 crop of late cluster hops involved here was duly grown and raised by plaintiff on said farm.*”²

Asserted error No. 1 (Appl’ts Br. 20) to finding that the parties bargained for one-half the salable crop of hops grown in 1947 by appellee on the designated premises. The finding uses the language of the contract (W. Ex. 1-A):

“That said Seller * * * does hereby agree to sell and deliver to the Buyer *one-half salable crop estimated at 100,000 pounds of fuggle and late cluster hops* to be raised and grown by the Seller in the year 1947 on the following described real estate situate in the County of *Clackamas*, State of *Oregon*, to-wit: *The Butte Creek Orchards farm situated about one mile north of Monitor, on which there is now growing and to be grown in 1947, forty acres of fuggle hops and one hundred, thirty acres of late cluster hops.*” (The italicized matter was typewritten on the buyer’s printed form contract.)

The rider attached to the contract specifies the price “to be paid by the Buyer to the Seller for the hops covered by this contract”.

In objecting to this finding appellant contends (Br. 20) that it was not required to accept these hops because of their quality. The Court found that appellant did accept these hops (post, p. xiv), and

that they substantially conformed to the quality provisions of the contract (post, p. xxxiv).

Asserted error No. 2 (Appl't's Br. 20-21) to finding that the crop was duly grown and raised by appellee on said farm. Appellant's witness Mr. Noakes testified concerning appellee's said hop yard in 1947 (W.R. 300):

“Q. How would you describe the care and cultivation of the yard?

A. Very good.”

Appellant's witness Mr. Davis testified (W.R. 358) that the yard “was in excellent condition for cultivating and stringing”.

Mr. Keber testified (W.R. 131) that Mr. Wellman's yard that year was one “of the outstanding yards in the country”. Mr. Keber's observation was based on an extensive survey of the hop yards in the Willamette Valley (W.R. 147).

Appellant's objection to this finding (Br. 21) is only the contention that the “undisputed” evidence shows the hops when tendered did not meet the contract. The evidence supporting the Court's findings that appellant accepted the hops and that they substantially conformed to the contract is summarized post, pp. xi-xiv, xv-xxiv; v-viii, xxxi-xxxiv, xxxv-xxxix.

This asserted error No. 2 is mentioned for the first time in appellant's brief, and is not included among the points designated by appellant upon which it would rely (W.R. 30-42).

Finding “4. By said contract defendant buyer agreed to advance to plaintiff seller, as part payment under the contract, certain sums on certain dates,

and the contract provided that defendant should have a prior lien upon said hop crop for such advances. Pursuant to said contract, defendant caused plaintiff to execute and deliver to defendant a separate chattel mortgage upon said 1947 hop crop, and defendant duly filed said chattel mortgage in the records of Clackamas County, Oregon. Defendant did not at any time release or discharge said mortgage of record.”

Asserted error: None.

Finding “5. Said contract provided in substance that if said growing crop at or before the time of picking was not in condition to produce the quality of hops called for by the contract, then the defendant buyer would have been released from its obligation to make any further advance under the contract. In 1947 there was, and defendant knew there was, widespread mildew in hop yards in the Willamette Valley in Oregon. *Before and at the time of picking defendant knew that there was mildew in plaintiff’s said late clusters hops and that said hops when picked and baled would in normal course show such mildew.*³ Defendant, having such knowledge, elected to make plaintiff a further advance payment to enable plaintiff to harvest said late cluster hops. *Such mildew in said late cluster hops did not thereafter become more pronounced or prevalent.*”⁴

Asserted error No. 3 (Appl’ts Br. 21) to finding that appellant knew the cluster hops would show such mildew when picked and baled. Mr. Noakes was the manager of the Salem office for appellant’s

local representative (W.R. 164, 220, 276, 299). He observed before picking that there was some mildew throughout Mr. Wellman's yard (W.R. 279, 301). Mr. Noakes testified (W.R. 318):

“Q. Would it be proper to say that the harvested hops showed the same mildew that the hops in the field had been showing for the past two months?

A. If it was in the field, it would show in the samples unless—if it was general in the yard, it would show in the sample, yes.”

Mr. Haas, appellant's vice-president, explained that the clusters from appellant's own Mitoma yard were picked with great care, “absolutely hand-screened,” but he admitted that they showed 10% leaf-and-stem content and that it was “only natural” some mildew would show in the baled hops (W.R. 465). Mr. Haas testified (W.R. 455) that “certainly” appellant disposed of its own Mitoma clusters; the various breweries to which they were sold are shown in W. Ex. 17 at the bottom of the second sheet.

Appellant's objection to this finding seems to be based on an assumption that Mr. Wellman should have employed not only the care which appellant used in picking its own hops, but should even have picked “selectively”. The normal manner of picking hops by hand is for the picker in one stroke to strip a quantity of hops off the arm of the vine into the basket (W.R. 132). “Selective” picking would mean picking each hop singly and turning it around to see if there was any mildew on it (W.R. 74).

Appellant's witness Mr. Ray testified (W.R. 227):

“Q. Would you say that such selective picking was feasible or practicable in Oregon in 1947?

A. No, I don't think it was practical. I do think it was practical and feasible to leave certain burrs on the vine where the infection might be worse, leave them unpicked, but I think what you mean, when we speak of selectively picking, it means picking the hops, you might say, one by one selectively off the vines. I don't consider that was practical."

Mr. Wellman agreed that such burr-by-burr picking "could not be done" (W.R. 74, 100, 102).

In view of the conditions that year Mr. Wellman's picking was done in a careful manner (W.R. 101, 118, 131-132), and in avoiding as many of the mildewed hops as possible a large quantity was left on the vines (W.R. 403-404). Mr. Keber (W.R. 132) and Mr. Glatt (W.R. 124) testified that it was not possible to harvest a crop showing mildew without having some of the mildew show in the baled hops.

See also appellee Smith's brief, pp. 16-18, and the Appendix thereto, pp. ii-iv, vii-viii, as well as the Appendix to appellee Geschwill's brief, pp. iii-v.

Asserted error No. 4 (Applt's Br. 21) to finding that the mildew did not become more pronounced or prevalent. The evidence is that the condition of the yard improved with respect to the mildew. Appellant knew of the widespread mildew that year brought on by the rainy weather (W.R. 340), and early in August appellant's local representative advised it (W. Ex. 3-b):

"In looking over Wellman's yard, we are not hopeful of any cluster delivery; at least, not much of a one. It remains to be seen how well the hops hang on the vines now that we are having hot weather."

After the mildew attack, however, the vines in Mr. Wellman's yard made a second growth (W.R. 102). This condition was general in such well-tended yards in the Valley, as Mr. Walker testified:

"* * * the hops that year [1947], after the mildew attack, made what we call a second bloom and made a second set in a great many cases, and the fields, you might say, flowered a second time and made a crop in lots of cases where it looked like they were hopeless." (G.R. 247.)

"We didn't have a great lot of mildew in the spring of 1947. * * * Then, in the summer, in July, we developed a very severe attack of mildew which prevailed up until in August. It looked like probably we really would not have a great many hops in the State of Oregon, but, as I said a while ago, the hops came on and made a second growth and flowered a second time, so we ended up with a pretty fair crop, some 82,000 or 83,000 bales, where earlier it looked like we might have only 40,000 or 50,000 bales.

Q. Was that second blooming you refer to typical in Western Oregon, or was that merely a condition that prevailed in your own yard?

A. No, I think it was pretty general over the hop territory. I think it was true particularly of fields that got proper cultivation and care." (G.R. 265-266.)

Accordingly, early in September a picking advance was made to Mr. Wellman, and appellant's local representative notified it (W. Ex. 3-d), "We find Wellman will have some clusters for delivery, hence the advance to him."

The hops in the bales showed less mildew than had the hops on the vines because the badly mildewed vines and arms were left unpicked (W.R. 101, 131-132, 403-404).

Finding "6. Defendant buyer made advance payments under the contract in a total amount which differed from that called for by the contract but which was agreed upon by the parties. Defendant reimbursed itself for all advance payments made under said contract, with respect to both the fuggle and the late cluster hops, by deducting the total of said advance payments from the amount due plaintiff for the fuggle hops purchased by defendant from plaintiff under said 1947 contract."

Asserted error: None.

Finding "7. *Plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon.*⁵ The time and place of such delivery was acceptable to defendant and was in accordance with the prior practice of the parties. *On September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties. At that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside.*⁶ Plaintiff

*duly performed all of the terms and conditions of said contract on his part to be performed.”*⁷

Asserted error No. 5 (Appl’s Br. 21-22) to finding that the grower duly raised, harvested and delivered the hops in warehouse. As to the raising and harvesting of the crop see ante, pp. iii, v-viii. As to the baling appellant’s inspector Mr. Davis testified (W.R. 362):

“Q. You considered that they were well baled?

A. Oh, yes.”

The contract provided (W. Ex. 1-A) for delivery “at Mt. Angel, Oregon, in warehouse or on board cars”. In accordance with the practice of the parties in prior years under the same series of contracts, the hops were delivered at Schwab’s warehouse, the only bonded warehouse in Mt. Angel. The time and place of such delivery was acceptable to appellant. (W.R. 71, 75, 241-242, 305-306; G.R. 100, 344.)

The assertion of error directed to the finding on delivery in warehouse is first mentioned in appellant’s brief (No. 5, p. 21), and is not included in the points to be relied upon (W.R. 31, point No. 5).

Appellant’s objection to this finding (Br. 22) is the contention that upon the “undisputed” evidence the hops tendered did not meet the contract. The Court found that the hops were accepted and did substantially comply with the contract, and the findings are supported by the evidence (post, pp. xi-xiv, xv-xxiv; xxxi-xxxiv, xxxv-xxxix).

Asserted error No. 6 (Appl’s Br. 22) to findings about acts done at warehouse.

(a) *Division of bales.* Appellant’s contract (W. Ex. 1-A) was for the purchase of “one-half salable crop” of both fuggles and clusters, and the contract

noted "an equal quantity sold to S. S. Steiner, Inc." As Mr. Eismann, Steiner's local manager, testified (W.R. 383):

"Q. Can you explain why it happened that half of the Wellman late cluster crop was contracted to one firm and half to the other?

A. We were both trying our best to buy the crop; at the time Mr. Wellman finally decided to split it."

As to the segregation of the bales between the two buyers, Mr. Noakes, who was the chief inspector there for appellant (W.R. 306), testified (W.R. 286):

"Q. How were the bales of clusters of Mr. Wellman in the warehouse at that time divided between you and Steiner? How was the physical division made?

A. When warehousemen line hops up, they handle them two bales at a time on the truck, and they would take them out of the pile and they lined up two bales for us and two bales for Mr. Steiner and continued that split until they were all lined up."

Mr. Noakes testified that the division of the hops with Steiner was acceptable and was done in a proper manner (W.R. 306). Mr. Wellman said that it was done "in the same manner that it was the year before" (W.R. 80).

The asserted error as to the finding on the segregation of bales is first mentioned on brief (p. 22, No. 6; compare pp. 9-10), and is not included among the points on which appellant relied (W.R. 31, point No. 6).

(b) *Appellant received, inspected, sampled, marked and weighed the bales constituting its one-half of the crop.* Mr. Noakes testified (W.R. 306):

“Q. Did you inspect, sample, mark and weigh the hops, both fuggles and clusters, in Schwab’s warehouse on or about September 25th?

A. Yes.”

Mr. Noakes explained his procedure as follows (W.R. 286-287):

“After the hops were lined up, we would go through them with triers and draw a sample handful out of each and every bale, and place that handful of hops on the head of the bale, and then later on we would bring a handful of the hops out to the doorway, to the light, and we would make a comparison between the tryings out of each bale with the type sample we had that was drawn previously.

“If there is no appreciable difference in the hops, we would take the samples in order. If there should be a difference in them, then we would segregate them and put the different qualities on one or the other—either the front end or the last end of the row. Later we would number those bales and then weigh them.”

Mr. Wellman testified (W.R. 80-81):

“Q. After dividing the bales to one platform and the other, what did they do, as far as the representatives of John I. Haas were concerned?

A. Inspected and took tenth-bale samples.

Q. Did they take tryings out of each bale?

A. Yes, they did that every year.

Q. Did they put numbers on the bales?

A. Yes, they numbered them from one on up. * * *

Q. Were the hops weighed in at that time?

A. Yes. * * *

Q. Were they handled in the usual manner?

A. Exactly like they had the three previous years."

The finding is further supported by W.R. 80-82, 286-289, 306-311; W. Exs. 1 (weight slips), 3-j, 3-k.

In accordance with the custom (W.R. 111, 141, 359) the buyer numbered the bales on the head but at that time did not brand them. As Mr. Noakes testified (W.R. 308):

"Q. In these cases where you actually put on a brand, the Haas corporation brand, isn't that usually done—

A. When we made shipment."

In this case it is admitted that the fuggles were accepted (ante, pp. ii, viii) but not branded by Haas (W.R. 308). Dealers ordinarily do not brand the bales before shipment (W.R. 111, 141, 308, 359) because they do not know in whose name the bales will be shipped. Thus, the Wellman fuggles here were in fact transferred to Steiner (W.R. 188-189), and Loewi shipped out the Smith fuggles in the name of another dealer (S. Ex. 30).

(c) *The cluster hops were identified, appropriated to the contract and set aside.* Each of the bales of hops was identified by the Government inspection

number, the warehouse number and appellant's bale number (W.R. 110).

Mr. Noakes testified that the warehouse number was on the bales prior to his inspection (W.R. 307). Speaking of the markings on the bales he said (W.R. 289):

“There would be the warehouse lot number, and that would be put on by the warehousemen as the hops came into the warehouse.”

When the bales were lined up prior to appellant's inspection the Department of Agriculture code number was put on each bale. Mr. Noakes testified:

“It is a code number used by the Department of Agriculture to identify each lot, each lot that they sample [for leaf-and-stem content]. The grower has a code number and if he has more than one lot they are classified by letters.” (W.R. 288.)

“The State requires that a code number has to be on them before they will draw their samples, before they will make their inspection.

Q. What is the object of that requirement?

A. They want to be sure that the identifying code number is on the bale when their sample is taken.

Q. So they can subsequently identify the bale and the sample together, is that correct?

A. That is right. The same number has to be on this cardboard container [in which the sample is placed] as is on the bale.

Q. Did you number the bales that you looked at? Did you number them on the head?

A. Yes.” (W.R. 307-308.)

After appellant's representatives inspected, sampled, marked and weighed the bales, the warehousemen stacked them back in the warehouse (W.R. 82). The Ray corporation is appellant's local agent (W.R. 163, 219-220; W. Ex. 3-s), and these hops were carried on the books of the warehouse as "A. J. Ray contract" hops (W.R. 75).

Appellant's particular objection (Br. 22) to this finding of fact is based upon appellant's legal argument as to its "assent". This matter is discussed in appellee Geschwill's brief, pp. 58-60.

Asserted error No. 7 (Appl't's Br. 23) to finding that the seller duly performed conditions precedent. Appellant's contention is only that, "if the contract is construed in the manner advocated by the defendant," the hops did not meet the contract. For citations to the evidence supporting the Court's findings that the hops were in fact accepted, and did substantially conform to the contract, see ante, pp. xi-xiv, post, pp. xv-xxiv; ante, pp. v-viii, post, pp. xxxi-xxxix.

Finding "8. *At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops.*⁸ *The parties did not agree upon any change in or deviation from, and plaintiff did not waive, said established custom and usage.*⁹ *Defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff as aforesaid,*¹⁰ and defendant was obligated to pay the con-

tract price therefor on or before October 31, 1947, but defendant did not then or thereafter pay said price or any part thereof.”

Asserted error No. 8 (Applf's Br. 23) to finding that weighing-in the hops was an acceptance.

(a) Appellant's main objection (Br. 47-52) to the finding is that not enough witnesses testified to the existence of the same custom over a sufficiently long period. In so contending appellant omits much of the relevant evidence.

The contract is dated February 7, 1944 (W. Ex. 1-A), the hops were weighed-in on September 25, 1947 (W.R. 232), and the trial was held early in 1949 (W.R. 49).

Mr. Geschwill “had experience about 10 or 12 years in hops” (G.R. 70), and had been growing his own since 1943 (G.R. 71). He testified (G.R. 116) that as long as he had raised hops the custom was that the hops were accepted when the buyer weighed them, “when they went over the scale.” “The ones they rejected, they naturally wouldn't weigh them at all.”

Mr. Keber, who had been familiar with the hop business for over 35 years (W.R. 130), testified he had always understood that in the hop trade the weighing-in of hops was considered an acceptance of them (W.R. 134). He also testified (W.R. 138):

“Q. In your banking business did you act and did your bank act upon the basis of such trade practice?

A. Yes. We considered hops were sold when they passed over the scales, giving them weight receipts showing the amount of hops they got.”

(Both copies of the weight receipts here, prepared by Mr. Noakes at the time of the inspection and weighing, W.R. 290, are in evidence in W. Exs. 1, 2.)

Mr. Wellman, who had been engaged in the hop business since 1930 (W.R. 58), testified that in the hop business the weighing of hops was considered an acceptance, saying (W.R. 83) "that is the only way I have ever sold hops; after they went across the scales, it was delivery."

Mr. Glatt, who had been in the hop business about 20 years (W.R. 120), testified (W.R. 422-423):

“Q. If something appears to be wrong with the bale so that the buyer does not want to accept that bale, what is the practice as to whether or not that bale is weighed and numbered?

A. That bale generally is set out, and the buyer would notify the grower that that bale would not be acceptable. Frankly, I haven't had that experience.

Q. But that is the usual practice?

A. Yes.

Q. Then, if he sets that bale out, is that bale thereafter weighed and numbered?

A. Well, if he rejects that particular bale, it is not weighed or numbered.

Q. It is not weighed or numbered if it is set out there?

A. Correct.”

Mr. Glatt testified (W.R. 126) that weighing hops constituted an acceptance of them if there was an agreement as to price and the tryings or samples

would meet the type sample. (It was agreed here that the sales price was the market price, post, p. xxiv, and the tryings did meet or were even better than the type sample, W.R. 309-311.)

No witness denied the custom of the trade that weighing was acceptance. Mr. Paulus, a buyer's agent, said that he had not received legal advice on the matter, but that it "has been so understood" that such was the custom of the trade (S.R. 252). Mr. Paulus was instructed by his principal, Hugo V. Loewi, Inc., on October 3, 1947 (G. Ex. 47) not to weigh any hops without a special agreement with the grower "as weighing them would imply that we were considering accepting these hops at some price."

(b) Appellant also objects (Br. 48) to the finding on the ground that at the time of the acceptance the parties had not received the official certificate on the leaf-and-stem analysis.

Ordinarily on large lots such as this the samples for leaf-and-stem analysis were taken at the same time that the hops were weighed in by the buyer (W.R. 415).

Mr. Ray testified the practice was that, *after* hops had been accepted by his company for appellant, those hops would be paid for as soon as the leaf-and-stem certificate was issued, "but in case the inspection certificate has not been received we are forced to wait until it has been issued so that we know how to pay." (W. R. 417.) Mr. Wellman testified to the same fact (W.R. 412).

Mr. Keber testified (W.R. 143) that hops frequently are accepted by being weighed before the

leaf-and-stem analysis is received. "That is done right along."

See also post, pp. xxvi-xxx, xxxiii.

(c) Appellant further objects (Br. 52-53) to the finding with the contention that appellant made no inspection of the hops at the time they were tendered for delivery, but that the only inspection was of the tenth-bale samples later by appellant at its Eastern office.

By telegram dated September 24, 1947, appellant advised its Oregon agent in part (W. Ex. 3-g):

"On questionable lots require tenth bale samples and time to submit samples our customers."

By reply telegram of the same date (W. Exs. 3-h, 3-i) appellant's Oregon agent advised it, partly in code (W.R. 181):

"Retel date. Will attempt proceed inspect sample and weigh all floor and high price contracts with distinct understanding with growers this chain [does not] constitute acceptance of hops. Cooperas [will send] inspection samples fast as possible. * * * Having seen the hops might jeopardize our position. * * *"

Appellant answered by telegram of September 25th (W. Ex. 5):

"Retel. Suggest all contract [growers] * * * be notified by letter that inspection sampling and weighing does not constitute acceptance and that decision this question by home office will be communicated to grower later so no misunderstanding such inspection etc. can arise. * * *"

Thereupon, Mr. Ray said (W.R. 230-231):

“* * * I drafted a letter, which was typed and sent to all contract growers, and I told them not to send it to Mr. Wellman because they were inspecting and weighing and sampling Mr. Wellman’s hops that very day.”

Both the fuggle and cluster hops were weighed in that day (W.R. 232). Subsequently, and apparently without even seeing the tenth-bale samples, appellant decided it wanted the fuggles but probably not the clusters (W. Ex. 3-s).

Asserted error No. 9 (Applt’s Br. 24, 53) to finding that there was no agreed deviation or waiver of custom that weighing-in constituted acceptance.

Appellant denies the custom, but says that if this Court “adopts the finding” that there was such a custom, “it is acknowledged that there is some evidence that the parties did not agree upon any deviation from it.” (Applt’s Br. 53.)

On September 24, 1947, at Schwab’s warehouse in Mt. Angel appellant took in under a “prime quality” contract the Seaman clusters which showed some mildew and had 14% leaf-and-stem content (W. Ex. 17, pp. 8-9; W.R. 329-330). Appellant denies, however, that the following day at the same warehouse it took in the Wellman clusters which showed some mildew and had only 11% leaf-and-stem content. Mr. Noakes testified (W.R. 330) that Mr. Wellman’s was “the first crop that went through under the arrangement of sending in tenth-bale samples.” The evidence indicates that Mr. Wellman’s was the last crop taken in under the customary arrangement.

Mr. Ray's testimony. As noted ante, pp. xv-xvi, the custom was that if the hop buyer did not intend to accept hops which ran up to the type sample, the hops would not be numbered or weighed. Mr. Ray testified (W.R. 234-235) that in years prior to 1947 it was determined at the time of the inspection at the warehouse whether or not the crop as a whole would be accepted. However, Mr. Ray testified that a few days before September 25, 1947, in accordance with instructions which he had received from Mr. Frederick Haas, he instructed Mr. Noakes not to inspect and weigh in Mr. Wellman's hops without an agreement that such acts would not constitute an acceptance (W.R. 194, 231-235). Mr. Ray could not say when he received such instructions (W.R. 233). The only documentary evidence produced by appellant is that such a *suggestion* was first made to Mr. Ray by appellant on September 25th (W. Ex. 5, quoted ante, p. xviii).

Mr. Frederick Haas said (W.R. 448-451) that the instructions given Mr. Ray were covered by appellant's letter of September 16th (W. Ex. 18), but that letter says nothing about weighing-in hops (W.R. 460-461, 469).

Mr. Ray testified (W.R. 249) that he had no personal knowledge of any arrangement with Mr. Wellman. Mr. Ray also testified (W.R. 230-231) that he did not write Mr. Wellman a letter as suggested in the telegram of September 25th, and as he wrote other growers, "because they were inspecting and weighing and sampling Mr. Wellman's hops that very day."

Mr. Noakes' testimony. Mr. Noakes said that in his instructions from Mr. Ray (W.R. 324), "Nothing was said about weighing in the hops. The instruc-

tions were that we could make an inspection of both the fuggles and the clusters and draw tenth-bale samples, and weigh them, if necessary, if Mr. Wellman agreed, and then send all the samples" in to Mr. Ray's office for approval by the Haas' corporation office in the East. Mr. Noakes characterized the proposed procedure as one "that deviates from the usual custom" (W.R. 327).

Mr. Noakes then testified about his conversation with Mr. Wellman as follows (W.R. 283):

"Mr. Wellman came to the office and said he was very anxious to get away on a hunting trip and wondered if we could not come and make an inspection of his hops, and I told him the only way we could possibly do it, as we did not have any acceptance of the type samples, I was willing to go through them, make an inspection, draw tenth-bale samples and send them for approval, and it would be in no way an acceptance of the hops."

Mr. Wellman's testimony. Mr. Wellman said he called on Mr. Noakes at his office and told him (W.R. 399), "I would appreciate it very much if we could finish this job and I could get this hop business off my mind so we can go on a real hunting trip," and Mr. Noakes said he would do everything he could "to see that the job was done" before Mr. Wellman went hunting. Mr. Wellman testified that he did not have any conversation at any time that the weighing-in of the hops would not constitute an acceptance in accordance with the usual custom (W.R. 398).

Mr. Wellman considered that the hops had been delivered and accepted—"Noakes accepted them, weighed them and marked them" (W.R. 112).

Mr. Davis, who was Mr. Noakes' assistant, and who was present at the conversation between Mr. Noakes and Mr. Wellman, did not directly contradict Mr. Wellman's testimony on this point. His only unequivocal testimony is that Mr. Wellman "asked to have his hops inspected and Mr. Noakes said that he would arrange to go through them and make his inspection" (W.R. 366). According to Mr. Davis, Mr. Noakes said, "We will have to send these [tenth-bale] samples in" (W.R. 369).

The evidence is that tenth-bale samples are always taken at the time of the regular warehouse inspection, and are always sent in to the buyer. If Mr. Wellman was told that the tenth-bale samples in this case were to be sent in, he could only understand that the transaction would be handled in the customary manner. (See particularly W.R. 418-438.)

Asserted error No. 10 (Appl'ts Br. 24, 54-62) to finding that appellant in fact accepted the cluster hops. See citations to evidence, ante, pp. xi et seq.

(a) Counsel say (Appl'ts Br. 24) this finding that appellant accepted the hops in September is "clearly erroneous" because the trial Court "found as a fact that in October, 1947, the defendant notified the plaintiff that it did not wish to take said hops." Counsel's assertion, based on some contention of retroactive, unilateral repudiation of the prior acceptance, requires no comment.

(b) Counsel also object (Appl'ts Br. 54-62) to the finding on the contention that when the buyer's

representatives attended at the time and place the hops were tendered for delivery, and there inspected, sampled, marked and weighed the bales, such acts did not constitute an "inspection." The evidence is to the contrary, ante, pp. ix-xiv.

Appellant contends it had a right to base its decision on an inspection of tenth-bale samples rather than of the whole crop, and to inspect such samples at a subsequent time and a different place. The legal points raised by this contention are considered in the main part of the brief, but upon the facts it is not clear that appellant even purported to base its decision upon any inspection of the tenth-bale samples.

The fuggles and clusters were both weighed-in on September 25th. On September 26th its Oregon agent forwarded the tenth-bale samples of both fuggles and clusters to appellant, saying that the hops had been weighed, inspected and sampled (W. Ex. 3-j). The samples were forwarded by express (W. Ex. 3-j). There was then an express strike and such parcels sent from Oregon in September were not delivered in the East until about October 14th (S.R. 313; S. Ex. 43). On October 10th appellant wrote its Oregon representative (W. Ex. 3-s) in part:

"* * * We are wiring you today to take over their [Mr. Wellman's] fuggles and send the samples to us as soon as possible. * * * While we have not reached a definite decision, it is our opinion at this writing that the Wellman Clusters will have to be rejected and we will advise you further about this when we have a better line of samples on the various lots."

Then on October 18th (W. Ex. 3-u) appellant wrote its Oregon agent that it thought the cluster hops were dirty-picked though it had not received the official analysis, that "the restrictions on brewers in the use of grain has changed the picture considerably," and that "the only thing to do is to inform him [Mr. Wellman] that they [the clusters] are rejected, providing we already have taken possession of the Fuggles so that we have in this way gotten back our \$20,000.00 advances."

Finding "9. There was no Federal price regulation in effect covering the 1947 crop of Oregon hops, and the price to be paid by the defendant buyer for said late cluster hops under said contract was the grower market price for such Oregon hops on the particular date selected by the plaintiff seller between the dates specified in said contract. The grower market price for such hops in September and October of 1947 was 85 cents a pound. *Said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to defendant and which conformed to the prior practice between the parties.*"¹¹

Asserted error No. 11 (Applt's Br. 24) to finding that the grower market price was selected and communicated at a time and in a manner which was acceptable to appellant and which conformed to the prior practice of the parties. Appellant's counsel say (Br. 24) that this finding is "clearly erroneous" because "it is undisputed that the plaintiff

did not designate any grower market price in writing as required by the contract." Contrary to counsel's suggestion, the contract provides (W. Ex. 1-A):

"* * * the price to be paid by the Buyer to the Seller for the hops covered by this contract shall be either Forty five cents (45c) per pound or the Grower market price whichever is the higher for Oregon hops of the kind and quality covered by this contract as of that date between August 15th. 1947 and November 15th. 1947, as Seller may elect which election shall be communicated to Buyer on the day selected and confirmation of the above price to be in writing and signed by Seller and Buyer promptly upon notice by Seller to Buyer of that selected date."

In other words, an oral selection by the grower was proper, but the contract contemplated, as evidence of the fact, a written confirmation by the buyer to be signed also by the grower. Here the buyer decided to confirm orally rather than in writing.

Mr. Noakes testified (W.R. 303) that about September 11th Mr. Wellman called him on the telephone and selected the market price. They agreed upon the base price of 90 cents for fuggles and 85 cents for clusters, which were then the market prices (W.R. 71, 304). Mr. Noakes testified (W.R. 304):

"Mr. Wellman asked if it was necessary to put it in writing, and I told him I didn't think it was necessary; that we had not done it in previous years, and it would mean a trip back home or to Mt. Angel, and I said, 'If that is okeh

with you, it is all right with me.' A good share of our business is done that way."

Mr. Ray said (W.R. 217-218), "We [the Ray company] had authority to confirm the selected price". Appellant also told the Ray company it could fix the price for clusters on market-price contracts at 85 cents on the sliding-scale basis (W. Ex. 3-f; W.R. 177-178). Mr. Wellman's selection of the growers' market price, and Mr. Noakes' confirmation thereof, were made in the same manner as in prior years under the same series of contracts (W.R. 228, 304), and the Haas corporation never refused to recognize such telephonic selections and confirmations (W.R. 229). The Ray company notified appellant of the telephonic price selection here (W. Ex. 3-q; W.R. 227-228), and appellant took the fuggles at the price so selected (W.R. 228).

Finding "10. The leaf and stem content of said late cluster hops was eleven per cent or three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947. *According to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by deducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent.*¹² *The parties designated the grower market price pursuant to said contract at 85 cents per pound without reference to leaf and stem content.*"¹³

Asserted error No. 12 (Applt's Br. 24-25, 41-45, 71-72) to finding that the leaf-and-stem content was

compensated for, and the market price was computed, by deducting the sliding-scale discount. See appellee Geschwill's brief, pp. 7-9.

Appellant objects extensively on brief (pp. 24-25, 41-45, 71-72) to the finding that the market price was computed with reference to the sliding scale of premiums and discounts of one cent a pound for each one per cent of leaf-and-stem content below or above eight per cent. This matter was not mentioned among the points which appellant designated it would rely upon (compare specification No. 12, Br. 24-25, with point No. 15, W.R. 33).

(a) Appellant's first objection to the finding is the claim (Br. 42) that only its witness Mr. Ray so testified and that Mr. Ray's testimony is not sufficient to establish the fact. Contrary to counsel's representation, others of appellant's witnesses testified to the same effect.

Mr. Ray explained the matter very thoroughly:

"There has been a custom since the advent of the OPA ceiling prices on hops to have an official analysis of every lot of hops grown on the Pacific Coast, to determine the percentage of extraneous matter, which consists principally of stems and leaves, and also the percentage of seed, because a great many contracts are for seedless or semi-seedless hops, so that the analysis is necessary, and during the period of the OPA the ceiling price was based upon the extraneous matter content of the hops. * * *

"After the expiration of the OPA ceiling prices, the trade was favorable to having that practice of official analyses continued, and all contracts, I believe, provide that the determina-

tion of the picking,—that is, the leaf-and-stem content,—and also the determination of the seed content of the hops shall be decided by this inspection, which is a joint United States Department of Agriculture and Oregon State Department of Agriculture proceeding.” (W.R. 197-198.)

“All contracts had sliding-scale price provisions, in one manner or another. Some contracts were written before the sliding-scale price provisions were in vogue, before they were used, but the majority of these contracts were what we call open end or market-price contracts, and where it was established that the market was 85 cents, or a certain price, on the sliding scale, why, then, that sliding scale became applicable to the contract, even though it was not mentioned in the contract.” (W.R. 251.)

“* * * if they were open end [contracts] they provided for the fixing of the price, depending upon the Oregon growers’ market for prime-quality hops as of a certain date, selected by the grower. Now, if on the date selected by the grower, if the market on that date was, say, 85 cents for an 8 per cent hop, that was the market we would have to apply to that contract; that is, we would have to then apply the sliding scale feature because that was the market price.” (W.R. 255-256.)

Appellant’s witness Mr. Eismann, local manager for the large hop dealer, S. S. Steiner, Inc., testified (W.R. 387):

“Q. Did the Steiner corporation recognize

this sliding scale in 1947?

A. We did, uniformly throughout."

Appellant's witness Mr. Noakes explained (W.R. 316) that the older contracts, such as this, which were written before the official method for determining leaf-and-stem content became established, did not specifically refer to the sliding scale, but nevertheless the sliding scale "affected those contracts when it came to the market price." Mr. Noakes stated that under such contracts the sliding scale was applied in determining the market price, "because that was the procedure or the custom in the market that year" (W.R. 317).

The parties had previously recognized the sliding scale under this same series of contracts (W.R. 63). Mr. Wellman considered that the 1947 cluster hops had been accepted (W.R. 112), and that the price to be paid was "85 cents less a cent for each pound over 8 per cent pick, and a premium for under" (W.R. 113).

Appellant itself instructed its local agent to fix the price for clusters at 85 cents on the sliding scale basis (W. Ex. 3-f; W.R. 177-178), and to apply the penalties on picking (W. Ex. 3-w; W.R. 250-251).

(b) Counsel also contend (Br. 42-44) that the contractual provision relating to the market price should not be given the interpretation placed upon it by the parties and the trade generally. This contention does not involve factual matters and is discussed in the main part of this brief.

Asserted error No. 13 (Appl't's Br. 25) to finding that the 85-cent price selected was the base price before application of the sliding-scale feature. See citations to the record, ante, pp. xxvi et seq.

Appellant objects to the finding (Br. 25) first on the ground that the selected price was not designated in writing. See ante, pp. xxiv-xxvi.

Appellant's other objection is on the ground of a claimed deficiency of quality. The hops were in fact accepted, ante, pp. xi-xxiv, and they did substantially conform to the contract, ante, pp. v-viii, post pp. xxxi-xxxix.

Finding "11. *The grower market price for said hops under said contract was 85 cents per pound net weight, less 3 cents per pound deduction for leaf and stem content as aforesaid.*¹⁴ Said hops weighed 37,638 pounds net, as determined by defendant. *The contract price for said hops was 82 cents per pound or a total of \$30,863.16.*"¹⁴

Asserted error No. 14 (Appl't's Br. 25-26) to finding that the contract price for these hops was the market price of 82 cents a pound. Appellant here only reiterates:

(a) The contention that the interpretation placed upon such contracts by the trade generally, and upon this contract by both appellant and appellee, is not correct and is not binding upon appellant. See ante, pp. xxvi et seq.

(b) The contention that the grower should have selected the market price in writing. See ante, pp. xxiv-xxvi.

Finding "12. Plaintiff duly tendered said late cluster hops to defendant in warehouse at the place specified in said contract, and plaintiff was at all times ready, able and willing to give complete possession of said hops to defendant in exchange for

the price. Defendant did not pay said purchase price or any part thereof. (Defendant reimbursed itself for the partial advance payment out of the fuggle proceeds, as aforesaid.) Said hops, as defendant knew, continued to be held by the warehouseman until disposed of as hereinafter stated. Defendant at all times knew it could obtain said hops upon payment of said purchase price."

Asserted error: None.

Finding "13. *When the hops were tendered to defendant and defendant had inspected the same as aforesaid, and subsequently when defendant advised plaintiff that it did not wish to take said hops as hereinafter stated, defendant did not specify any particular objection it may have had to said hops.*¹⁵ *Upon trial defendant advanced the two specific objections that said hops showed some mildew and were somewhat above average in leaf and stem content.*¹⁶ *Upon the facts neither claimed defect was material.*"¹⁷

Asserted error No. 15 (Appl't's Br. 26) to finding that appellant did not specify any objection which it may have had to the hops.

(a) The finding refers to the time when the hops were tendered to and inspected by appellant. Appellant objects (Br. 26) to this part of the finding with the contention that the hops were not inspected at the warehouse. This matter is first mentioned on brief and is not included in the points on which appellant said it would rely (W.R. 34, point 19). The record on the matter is summarized ante, pp. ix-xiv.

(b) The finding also refers to a time subsequent to the acceptance of the hops. Appellant admits (Br. 26) “the defendant advised the plaintiff that it did not wish to take said hops,” but appellant argues that this was a rejection rather than an overture to revoke the prior acceptance. See post, p. xxxix.

(c) Appellant contends (Br. 17) that in the conversation of October 28th Mr. Noakes specified the particular grounds of picking and mildew in telling Mr. Wellman that appellant did not want to take the clusters. Some of Mr. Noakes’ general testimony might support that contention, but Mr. Noakes admitted he told Mr. Wellman (W.R. 321), “I just said they were not acceptable. * * * I was assuming he knew the condition of the hops.”

Mr. Davis, Mr. Noakes’ assistant, said of that conversation (W.R. 357), “I don’t recall that he said we cannot accept them for any certain reason, no. * * * I don’t recall that he came right out and gave a reason for not taking them.”

Mr. Wellman then thought they were paying him for the fuggles and the returns on the clusters would come through later (W.R. 84-85, 401). He did not then understand they were trying to repudiate the prior acceptance; rejection “was never mentioned” (W.R. 85, 91-92, 109).

Asserted error No. 16 (Appl’ts Br. 26-27) to finding that on trial appellant advanced the two specific objections to the hops of picking and mildew. Appellant criticizes the finding on the ground that on trial it claimed the hops showed *substantial* mildew and leaf-and-stem content.

(a) *Leaf-and-stem content.* The 11% leaf-and-stem content of these cluster hops was not as high as:

(1) The 14% of the mildewed cluster hops which appellant took in the day before it took in these (W.R. 329-330; W. Ex. 17, pp. 8-9).

(2) The 13% of the cluster hops which Mr. Ray admitted that appellant took in under prime quality contracts (W.R. 241).

(3) The 12% of some of Mr. Ray's own mildewed cluster hops which appellant took in and resold to breweries (W.R. 456-457; W. Ex. 17, pp. 6-7, 14-15).

The leaf-and-stem content of these hops was just the same (11%) as the leaf-and-stem content of many other cluster hops which appellant took in that year and resold to breweries, including 588 bales of Mr. Ray's own clusters (W. Ex. 17).

(b) *Mildew.* The record shows that hops with mildew such as these, and covered by "prime quality" contracts such as this, were as a general practice accepted in the trade that year (e.g., W.R. 116-117, 124-125, 138-139, 152-153, 241-242, 315-316, 329-330, 455-457; W. Ex. 3-w; S.R. 191; G.R. 223-224, 240-241).

Asserted error No. 17 (Appl't's Br. 27) to finding that neither claimed defect was material. Both claimed defects were known before and at the time appellant inspected and weighed in the bales at the warehouse, and thereby accepted them. Both appellant's chief inspector, Mr. Noakes, and his assistant, Mr. Davis, knew of the mildew and the picking (W.R. 300, 306, 314, 318, 322, 340, 349, 360, 362, 368).

From his examination of the hops in the field and his inspection of the hops in the warehouse

Mr. Noakes testified that they were large, flaky hops, well filled with lupulin and had quite a good flavor (W.R. 314). Mr. Davis, who also saw the crop in the field and helped inspect them at the warehouse, said they were large, whole-berried hops, well filled with lupulin and had a good flavor (W.R. 360). Mr. Ray's opinion in September, 1947, as expressed to his principal, was in accord (W. Ex. 3-k), but by the time of trial he had become more critical (W.R. 182-183).

The leaf-and-stem content was compensated for by the sliding-scale feature of the market price, ante, pp. xxvi-xxix.

And see ante, pp. v-viii, xxxi-xxxiii, and post, pp. xxxv-xxxix.

Finding "14. *Plaintiff delivered the very hops which were covered by the contract and upon which defendant had made advance payments.*¹⁸ *Said hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by defendant under contracts containing in effect the same provisions as to quality.*²⁰ *Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered.*¹⁹ *Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract.*"²¹

Asserted error No. 18 (Appl't's Br. 27) to finding that the grower delivered the very hops covered by

the contract and on which appellant had made advance payments.

(a) The hops delivered were the hops covered by the contract. Appellant here contends only that the contract did not cover one-half the specific crop, but rather unascertained goods. See appellee Geschwill's brief, pp. 6, 39-40, 50-51, and also ante, pp. i-ii.

(b) Appellant for the first time on brief (p. 27) questions the finding that the grower delivered the hops upon which advance payments were made. (Compare point 22, W.R. 35.) See uncontested findings, and citations to evidence, ante, pp. i-ii, iv-viii.

Mr. Noakes went through the cluster yard, saw the mildew, advised Mr. Wellman to pick, and subsequently made the picking advance. Mr. Davis also examined the cluster hops and knew the condition of the crop before and at the time of bringing out the check for the picking advance. (W.R. 72-73, 278-279, 398.)

Asserted error No. 20 (Appl't's Br. 28) to finding that the hops conformed to the quality provisions of the contract as those provisions were actually applied in practice. The evidence is that in 1947 all grower-dealer contracts called for one standard grade of "prime quality" (G.R. 283-284, 357, 452, 486). As Mr. Ray said (W.R. 235), "prime quality" contracts "were the only kind of contracts they had." The evidence is also that the great part of the 83,000 bales of Oregon hops that year moved in the trade under such contracts, and that nearly all the cluster crops showed mildew (W.R. 152-153; G.R. 250-251, 269; S.R. 183-184). It seems self-evident that hops such as these were in fact accepted in the trade as "prime".

The record shows that appellant accepted cluster hops showing mildew and a higher leaf-and-stem content under "prime quality" contracts (ante, pp. v, xxxiii).

Even appellant's inspector Mr. Davis admitted that these "were an average hop" (W.R. 362). As Mr. Ray admitted (W.R. 255), the then market price of average cluster hops was the contract price selected here.

Mr. Willig, manager of the Oregon Hop Producers Cooperative, testified concerning these hops (W.R. 152-153):

"Q. Would you say from your experience in selling hops over the years that hops of the same general character and quality of these had been accepted under this type of contract?

A. Yes, they had.

Q. In 1947 to whom did you sell your hops?

A. Directly to the breweries.

Q. Did you sell hops to breweries of the same general kind and quality as you have seen here in the courtroom?

A. That is about all we had to sell that year in the form of late hops.

Q. Did they accept them and make beer out of them?

A. That is right."

Asserted error No. 19 (Appl't's Br. 27-28) to finding that appellant did not rely on any warranty that the hops would be other than they actually were when tendered and delivered. Appellant's

argument here (Br. 28) is that it “must be conclusively presumed that the defendant did rely on the warranty”.

According to the usage of the trade, and of appellant itself, the hops did conform to the contract, ante, pp. v-viii, xxxi-xxxvi, and post, p. xxxviii.

Mr. Haas, Mr. Ray and Mr. Noakes all knew of the wide-spread mildew that year “in most of the yards around the state” (W.R. 340). Before harvest Mr. Noakes knew from his own examination that there was some mildew throughout Mr. Wellman’s cluster yard—“Some sections were worse than others, but there was some infection all through the yard, yes” (W.R. 300). Mr. Noakes knew that where there was such general mildew in the yard “it would show in the sample” (W.R. 318). Mr. Noakes knew that the principal factor in producing “dirty picking” is “the class of labor that is doing the harvesting.” Certainly appellant with its 10% leaf-and-stem content on its own “absolutely hand-screened” hops, and Mr. Ray with his 11% and 12% picking, were aware of the picking problems that year (W.R. 465; W. Ex. 17). Appellant in fact accepted mildewed clusters with 14% leaf-and-stem content that year (W.R. 329-330; W. Ex. 17, pp. 8-9).

Appellant, knowing of the conditions, did not release Mr. Wellman’s clusters from the mortgage-contract, and did not give Mr. Wellman an opportunity to sell his hops to another dealer for the then market price of 85 cents (W.R. 116; W.R. 88-89, 255).

Appellant gave its Oregon agent full discretion about making picking advances—“The matter of raising or lowering the amount to any grower is a matter entirely in your hands” (W. Ex. 3-c).

The contract (W. Ex. 1-A) provided:

“* * * before, at or during the time of picking of said hops the Buyer shall have the right to examine the condition of the growing hops to determine whether the same are at such time in the condition in which they should be to produce the quality and/or quantity called for by the terms of this agreement; and should there be a dispute or difference of opinion [arbitration is provided for]; and if it shall be determined that the growing crop is not in condition to produce the quality and/or quantity called for by this contract, then the Buyer shall be released from any obligation to furnish money as called for by this contract; * * *”

Having examined the growing crop, and knowing the conditions then existing, the buyer made the picking advance (W.R. 398).

Asserted error No. 21 (Appl't's Br. 28-29) to finding that the hops upon tender and delivery substantially conformed to the quality provisions of the contract.

These were such hops as were regularly taken in that year under similar contracts both by the trade generally and by appellant (ante, pp. v-viii, xxxi-xxxvii).

The mildew coloration of the hops did not affect the lupulin (W.R. 119, 134), and the lupulin is the valuable part of the hop (S.R. 182).

The principal test in judging hops is for flavor (G.R. 212, 429, 458, 489). Appellant's inspector Mr. Noakes found that the hops were well filled with lupulin and had quite a good flavor (W.R. 314). Appellant's inspector Mr. Davis likewise found that

the hops were whole-berried and had a good flavor (W.R. 360).

Finding “15. *Without rejecting said late cluster hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops;*”²² and from time to time thereafter defendant suggested that said hops be sold to some other buyer. *The parties hereto from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract.*”²³

Asserted error No. 22 (Appl't's Br. 29) to finding that appellant did not reject the hops. Mr. Wellman testified (W.R. 85), “There wasn't a word of rejection mentioned.” Mr. Wellman then did not understand appellant was seeking to avoid the prior acceptance. He testified (W.R. 401):

“Q. On October 28th, when this payment [the price of the fuggles less all the advances] was made, was anything said at that time about their refusing to take and pay for the clusters?

A. No, it wasn't mentioned on that date. * * * Before I took the check, I asked Mr. Noakes, I said, ‘Will this have any bearing on the settlement of the lates [late clusters], paying for the lates?’ And Mr. Noakes said, ‘Not whatsoever’. He says, ‘In fact, I think it will help you,’ and I said, ‘I don't know—I don't want to take this check unless it is so understood.’ ”

Asserted error No. 23 (Appl't's Br. 29) to finding that the parties continued to negotiate with respect to the clusters until May, 1948, when appellant finally renounced all liability on the contract. The

matter now objected to by appellant is not mentioned in its points which it said it relied upon (point 26, W.R. 36).

Mr. Noakes kept putting Mr. Wellman off about paying for the clusters. "He said he would keep calling the office and as quick as they got returns in from the East he would call me." (W.R. 86.) Finally Mr. Wellman was granted an interview by Mr. Ray, and they "talked over the difficulties of the season and the ups and downs, some of the experiences we had with picking and then he said, 'Otto, I will do my best'"—i.e., to "find a place" for the hops. (W.R. 86.) Mr. Ray said nothing about rejection or refusing to pay for the hops (W.R. 87).

In December, 1947, Mr. Wellman succeeded in arranging for an interview with Mr. Haas himself to see about paying for the hops. Mr. Haas, however, left town the night before, and instead of seeing him Mr. Wellman and Mr. Keber had another interview with Mr. Ray. Mr. Wellman told Mr. Ray "that I figured that Haas certainly has a moral and legal obligation to pay for these hops. Then Mr. Ray said, 'Morally so, but I wouldn't just agree with you legally; but,' he says, 'certainly we owe you morally for them,' and I said, 'I have been tied up under this contract while the market was very good and spot hops sold very rapidly during the early part of September,' and he just talked on—he said, 'I will certainly see what I can do.' " (W.R. 87-88.)

Appellant had not released the chattel mortgage on the hops (W.R. 89; W. Ex. 10), though admittedly Mr. Wellman owed appellant nothing. If the price of hops had gone up, appellant could have demanded the right to take the hops at the contract

price. The market price, however, continued down, and finally Mr. Ray in May, 1948, refused to pay for the hops and consented to release them so that they could be resold. (W.R. 88-89, 135-136.)

Finding "16. Hops are of a perishable nature; *there had been a material decline in the general market price and demand for 1947 Oregon late cluster hops;*²⁴ and the hops here involved could not readily be resold. On May 7, 1948, after defendant had been *in default*²⁵ in the payment of said price an unreasonable time, plaintiff after notice to defendant, and without waiving his rights against defendant, sold said hops to another buyer at a total price of \$11,904.31, which was the best price then obtainable therefor. Defendant consented to such resale. Said resale price was properly credited against the sum then due from defendant, and the *balance remaining due* was as follows:

Amount due from defendant on October 31, 1947.....	\$30,863.16
Interest thereon to May 7, 1948, at 6% per annum	956.25
	<hr/>
Amount due on May 7, 1948.....	\$31,819.41
Proceeds of resale on May 7, 1948...	11,904.31
	<hr/>
Balance	\$19,915.10 ²⁵
	<hr/>

No part of said balance has been paid."

Asserted error No. 24 (Appl't's Br. 29) to finding on the decline in price and the limited market. Mr. Wellman resold these hops in May, 1948, for 31 cents a pound, which was then the fair price for them (W.R. 91, 371). These hops brought more than Mr. Ray's clusters which were sold about the same time (W. Ex. 17, pp. 14-15).

As to the decline in price for good, average-quality 1947 seeded clusters from 85 cents in September, 1947 (W.R. 255), to 31 cents in May, 1948, and as to the limited market, see appellee Geschwill's brief, pp. 17-18, and Appendix thereto, pp. xxii-xxiii.

Asserted error No. 25 (Appl't's Br. 30) to finding that appellant is in default in payment of purchase price. Here again appellant has specified as asserted error matter not included in the points on which it stated it relied (compare point 29, W.R. 36). Appellant's contention is that, "if this contract is construed in the manner advocated by the defendant," the hops were not of sufficiently perfect quality. The hops were accepted (ante, pp. xi-xxiv), and were of acceptable quality (ante, pp. v-viii, xxxi-xxxix).

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN I. HAAS, INC., a Corporation,
Appellant,

v.

O. L. WELLMAN,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the
District of Oregon.

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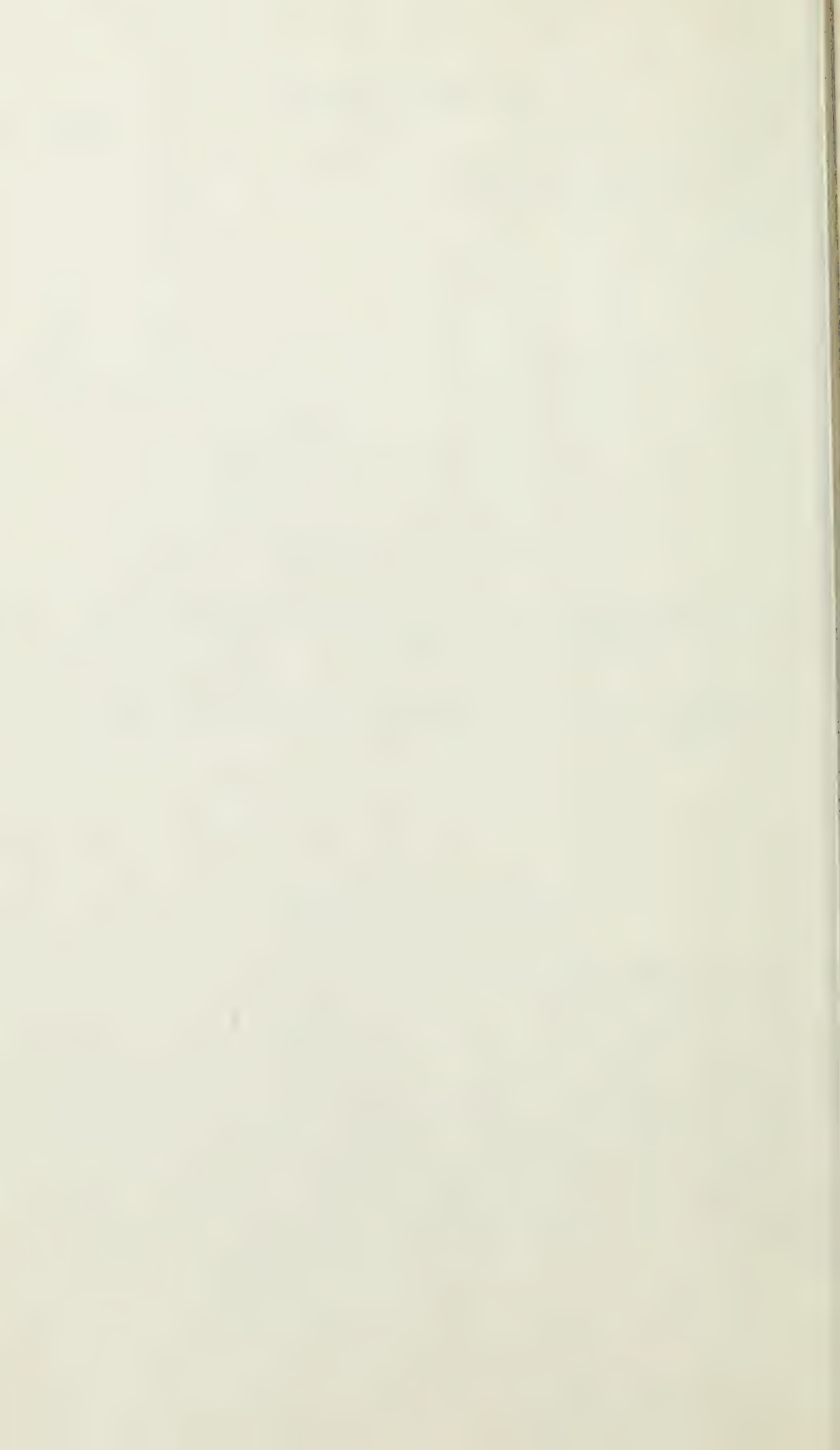
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Appellant,

v.

O. L. WELLMAN,
Appellee.

REPLY BRIEF OF APPELLANT

Appeal from the United States District Court for the
District of Oregon.

STATEMENT OF CASE

It is said in the plaintiff's brief, page 9, that Mr. Noakes told the plaintiff that he thought the yard should be picked. The record does not support that statement. The plaintiff testified that Mr. Noakes told him that there were so many good hops that he, Mr. Noakes, would not leave them, that is, fail to pick them (Tr. 407). Mr.

Noakes testified that he told the plaintiff that if they were his hops he would harvest at least some of them (Tr. 278).

While it is true, as asserted in the plaintiff's brief, page 10, that some hops of other growers were accepted by the defendant which had a leaf and stem content of 11% or more, there is no evidence that any of such hops were affected by mildew in any substantial degree. The defendant rejected the plaintiff's hops for two reasons: They were substantially and seriously damaged by mildew, and they were not cleanly picked. The character of the pick was the less important of these two reasons. Because of the mildew damage, the hops would not have been of prime quality even if the leaf and stem content had been 8% or less.

The defendant vigorously denies that it accepted the hops and denies that the weighing of them constituted an acceptance. This will be considered in detail in the argument.

The price was not paid when the hops were weighed on September 25, 1947, because the hops were not then accepted. The price was not paid at any other time because they were never accepted, but, on the contrary, were rejected by the defendant. Payment did not become due when the official leaf and stem analysis was received, nor at any other time.

The statement that the defendant instructed its Oregon agent to reject the plaintiff's cluster hops, assigning as a reason that "the restrictions on brewers in the use of grain has changed the picture considerably" (Ex. 3-U, Tr. 53, 55), is misleading in that counsel for the plaintiff

simply took one comment from its context and failed to mention the real reasons for the rejection appearing in that letter and others: the extensive mildew damage and the dirty pick. In the defendant's letter of October 30, 1947, to the Ray firm, this statement was made, "Wellman, sample No. 51: We confirm our instructions to reject these hops. They are extremely poor and the picking is certainly dirtier than the 11% indicated on the official analysis" (Ex. 3-W, Tr. 53, 55). Exhibit 3-U, just referred to, declares that the leaf and stem content was actually 19% (Tr. 53, 55).

The character of the negotiations between the plaintiff and the Ray firm, referred to in the plaintiff's brief, page 16, must be clarified. These negotiations, if the conduct of the parties may be so described, consisted simply in Mr. Ray attempting to find another buyer for the plaintiff's hops, and conversations with respect thereto, including suggestions by Mr. Ray to the plaintiff that the plaintiff should attempt to find another buyer himself. These "negotiations" had nothing whatever to do with whether or not the defendant or the Ray firm would or intended to buy or pay for the plaintiff's hops. The plaintiff understood in October 1947 that the defendant had not accepted and had no intention of accepting or paying for such hops. In his complaint the plaintiff alleged (Tr. 4): "defendant advised plaintiff in October 1947 that it did not wish to take said hops; and at that time and from time thereafter defendant suggested that plaintiff try to find some other buyer for said hops."

Reference is made by the plaintiff, page 16, to the fact

that S. S. Steiner, Inc., which contracted to buy the other one-half of the plaintiff's 1947 hops, after rejecting the plaintiff's cluster hops, settled with the plaintiff. Such compromise is clearly not binding on the defendant. Furthermore, the testimony of Mr. Eismann, the Steiner representative, establishes that there is a very clear reason why S. S. Steiner, Inc. might have been held liable to Mr. Wellman. The Steiner employee who weighed the plaintiff's hops at the warehouse gave to the plaintiff afterwards a weight slip setting forth the quantity of hops weighed and bearing the notation "Hops Received" (Tr. 382). This was not intended by the Steiner employee as an acceptance and it was delivered to Mr. Wellman without authority (Tr. 383, 384). No weight slip of any kind was given by the Ray firm to the plaintiff following the weighing of his hops. This is an extremely important fact which will be considered in the argument of the question whether the weighing of the hops by the Ray firm constituted an acceptance.

We desire here to correct an error which appears in the Statement of Case in our original brief, pages 18 and 19. It is there said that Mr. Ray testified that he told the plaintiff that he, Mr. Ray, thought that "the defendant had a moral, but not a legal, obligation to pay for the hops." That is incorrect. Mr. Ray actually testified that he told the plaintiff that he thought the defendant had a moral, but not a legal, obligation to find a home for these hops that had been rejected, that is, a buyer for them (Tr. 209, 210).

ARGUMENT

IV

The sub-heading in the defendant's original brief will be used again with such changes as are necessary.

1. The finding that it was an established usage and custom in the hop trade in Oregon that the weighing in of hops by the buyer following an inspection constituted an acceptance of such hops.

The defendant contends that the supposed custom should not be given effect for these reasons:

(a) The evidence is insufficient to establish that such custom or usage existed in Oregon.

We desire to emphasize at the outset that the plaintiff relies entirely upon the single act of weighing his hops, to establish an acceptance of them by the defendant. There is not one word in the transcript from which it can be inferred that the defendant actually agreed to take the hops. The plaintiff did not testify that anyone representing the defendant agreed to accept them.

We acknowledge that we failed to consider the testimony of Mr. Geschwill in his own case, in preparing the defendant's brief in the present case.

The defendant still contends vigorously, however, that the evidence is insufficient to meet the requirements of the law of Oregon.

The gist of the testimony of the witnesses on this subject is as follows:

Mr. Wellman: His testimony should be entirely disregarded as he simply stated that the only way he ever sold hops was that "weighing in" was considered to be an acceptance. He gave no testimony whatever with respect to any custom (Tr. 83).

Mr. Kever: This witness stated that weighing in is an acceptance, and he defined the term "weighing in" to mean the weighing of the hops plus the giving of the weight slip by the buyer to the grower (Tr. 134, 138, 140, 143).

Mr. Glatt: This witness testified that "weighing in" was considered to be an acceptance provided that there was an agreement that the hops weighed would be accepted at a certain price, and the tryings met the type samples. He stated that whether or not hops have been accepted is really a matter of intention and agreement of the two parties. (Tr. 126, 427, 428).

Mr. Geschwill: He said that there was an acceptance when the hops went over the scale and there was nothing wrong with them (Geschwill Tr. 116).

It is clear, therefore, that there is no uniformity in this testimony whatever. Not one of the last three witnesses mentioned supports either of the others. Each has a different version of the supposed custom. Nor can any one of the three versions be supported by the indefinite references of the defendant's witnesses.

The proof is therefore fatally defective in two respects:

(1) No custom is established by the testimony of two witnesses, as required by Sec. 2-902 O.C.L.A.

(2) The supposed custom is not uniform as required by *Port Investment Co. v. Oregon Mutual Fire Insurance Co.*, 163 Or. 1, 94 Pac. 2d 734.

The plaintiff now contends that the "weighing" of the hops constituted the acceptance. The finding on which

that contention is based, however, declares that the custom was that the "weighing in" of the hops constituted an acceptance (Tr. 12).

There is no finding that "weighing" the hops amounted to an acceptance. The finding is explicit that it was the "weighing in" which constituted the acceptance.

Counsel for the plaintiff and the witnesses who testified for one or more of the plaintiffs were careful to avoid the word "weighing" and to use only the expression "weighing in," apparently for the reason that the latter expression carries the connotation of "acceptance," whereas the simple word "weighing" does not.

In any event, the only finding in this case is that it was the "weighing in" which constituted the acceptance. It therefore becomes important to determine what the witnesses meant by the term "weighing in." The only witness who actually defined the term was Mr. Kever, who testified as follows (Tr. 140):

"Q. What constitutes actual weighing in? What is done in connection with weighing in hops?

A. Well, weigh them and mark it on a slip, and the grower gets a slip and the buyer keeps a slip with the weight on."

It is clear, therefore, that this finding means that it is the weighing of the hops by the buyer plus the giving of a "slip with the weight on," that is, a receipt or acknowledgment, which constitutes the acceptance.

No receipt, acknowledgment or weight slip of any kind was delivered to the plaintiff when his hops were weighed on September 25, 1947, or at any other time material to this case.

Exhibit 2 (Tr. 53), the weight slip prepared by Mr. Noakes when the hops were weighed, came into the hands of the plaintiff's counsel after this action was started. It was taken from the defendant's files, which is fully confirmed by the fact that it bears on its face, in red pencil, the word "Rejected." Mr. Noakes testified that he sent it to the Hillsboro office of the Ray firm (Tr. 290). This is confirmed by the testimony of Mrs. Townsend, the office manager of the Ray firm (Tr. 264, 265). There is no evidence that the plaintiff was ever given a copy or duplicate of it.

The testimony of Mr. Geschwill adds nothing to Mr. Wellman's case. If Mr. Geschwill's testimony can be construed to mean that "weighing in" consisted merely of weighing, which is denied, it is still insufficient to establish that weighing alone constituted a "weighing in," for these reasons:

(1) The custom is not uniform, as Mr. Kever testified that a receipt or weight slip must be given at the time of the weighing, to bring about a "weighing in."

(2) The custom expressed by Mr. Geschwill is not established by the testimony of two witnesses, as no one corroborated him on this point.

It is therefore clear that the custom expressed in the first sentence of Paragraph 8 of the Findings of Fact may not be applied and that the plaintiff may not now rely upon some other custom not supported by the findings or the evidence.

(b) The custom or usage set forth in the finding can-

not be given effect and has no application to this case for the reason that the contract is not ambiguous and there is no need nor occasion for interpreting it.

Section 2-228 (12), O.C.L.A., contains this provision:

“* * * usage is never admissible except as a means of interpretation; * * *.”

The contract declares that the defendant will pay the balance due on the purchase price “upon delivery and acceptance of said hops” (Exhibit 1-A, Tr. 53). In other words, the defendant became liable only upon delivery of the hops and the acceptance of them by the defendant.

It cannot possibly be said that there is any ambiguity in the word “acceptance” as used by these parties, as it must be construed to have the same meaning as that given to it by the Uniform Sales Act, in the absence of evidence that the parties intended the word to have some other meaning. There is no evidence that such was the fact.

Section 48 of the Act, Section 71-148, O.C.L.A., declares:

“The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, * * *.”

In *Vacuum Ash & Soot Conveyor Co. v. Huylers*, 101 N.J.L. 147, 127 Atl. 203, the court said that to constitute an acceptance of goods, there must be “some unequivocal act with intent to take possession of the goods as owner.”

Nor is there any ambiguity in the word “acceptance” when it is given its plain and ordinary meaning. In the defendant’s brief, page 64, it is shown that the word

“accept” means “to receive with a consenting mind,” that is, “to come into possession of, get, acquire, or the like” with a consenting mind.

It is clear, therefore, that there is no possible ambiguity in the word “acceptance,” whether it is given the statutory definition or that found in the standard dictionaries. It follows that the supposed custom relied upon by the plaintiff cannot be given effect.

There was no acceptance in this case, within the meaning of either of these definitions.

The defendant certainly did not intimate to the plaintiff by word or act that it accepted them. The plaintiff does not rely upon any evidence that there was such an intimation. His sole contention is that in a complete vacuum, devoid of any words, the defendant weighed his hops. He did not intimate in any way that the defendant agreed to accept them.

Nor can it be said that the defendant received the hops with a consenting mind. The defendant did not “receive” them nor did it have a consenting mind.

2. The finding that the defendant accepted the plaintiff’s hops.

The entire record, in fact every circumstance, indicates that there was no acceptance. The many circumstances which support this conclusion are set forth in the Statement of Case in the defendant’s brief, pages 16 to 20.

One fact, particularly, should be emphasized: In his complaint the plaintiff alleges that when the defendant advised the plaintiff that it did not wish to take his hops,

in October 1947 (October 28), "defendant suggested that plaintiff try to find some other buyer for said hops" (Tr. 4).

This allegation is a clear confirmation that there was no acceptance and that the plaintiff was fully aware that such was the fact, in October 1947.

V

The plaintiff's only answer to the argument under this heading is that the defendant did not specify any particular objection it may have had to the hops when they were tendered to the defendant at the warehouse or when the defendant notified the plaintiff that it did not wish to take such hops.

The plaintiff, in quoting the testimony of Mr. Noakes, page 33, omitted from his quotation the most significant part of it, as follows (Tr. 321):

"Going back a year and a half, it is pretty hard to remember just exactly what you said, but I am sure Mr. Wellman understood they were not taking his hops, because we talked about it, and it definitely was understood that the quality was such that they would not accept them. I know that."

The plaintiff's reference to this incident was that nothing was said about a rejection (Tr. 85, 91, 109). It is true that Mr. Noakes did not testify that he told the plaintiff that the defendant "rejected" his hops. As pointed out, however, in the defendant's brief, pages 62 to 66, Mr. Noakes did tell the plaintiff that the defendant could not and did not accept his hops. The authorities

discussed in that portion of the argument establish that the use of the word "reject" was not necessary to bring about an actual rejection.

Furthermore, the plaintiff is in no position to contend that his hops were never rejected or that he did not know they were rejected. In his own complaint (Tr. 4), he admitted that the defendant suggested that he try to find some other buyer for his hops. There could have been no possible reason for such a suggestion by the defendant unless the defendant had already rejected the plaintiff's hops.

The defendant respectfully contends, therefore, that the evidence is such as to create a definite and firm conviction that a mistake has been made by the trial court in the finding that the defendant did not specify any particular objection it may have had to said hops, and that this finding should therefore be set aside. In support of that contention the defendant relies upon the authorities set forth in the original Geschwill brief, pages 39 and 40.

If, however, this finding is sustained, the defendant contends that the Oregon tender statute, Section 72-103, O.C.L.A., referred to in the plaintiff's brief, page 32, has no application for the reason that it was repealed by the Uniform Sales Act.

Section 79 of the Act, Section 71-179, O.C.L.A., provides:

"All acts or parts of acts inconsistent with this act are hereby repealed, * * *."

The defendant contends that the Oregon tender stat-

ute, enacted in 1862 and never amended, is inconsistent with Section 19, Rule 4 (1) of the Uniform Sales Act, Section 71-119, Rule 4 (1), O.C.L.A., and was therefore repealed.

Section 72-103, O.C.L.A., declares:

“The person to whom tender is made shall at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; * * *.”

Section 19, Rule 4 (1) of the Act, enacted in 1919, provides:

“Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. * * *”

By reason of Section 19, Rule 4 (1) of the Act, title to property passes when there is an appropriation with assent. It cannot be said to pass when there is appropriation without assent. The expression of non-assent, that is, of rejection, is therefore sufficient to prevent the passing of title, whether any reason is given for the rejection or not. To the extent that the Oregon tender statute required something in addition to a rejection or expression of non-assent, it was inconsistent with Section 19, Rule 4 (1) of the Act and was repealed.

VI to IX

Inasmuch as the appellee has adopted by reference its argument applicable to these headings in the Geschwill case (Br. 37), we incorporate by this reference the material in the reply brief in the Geschwill case, pages 13 to 20.

Respectfully submitted,

KERR & HILL,
ROBERT M. KERR,
STUART W. HILL,
Attorneys for Appellant.

No. 12443

United States
Court of Appeals
For the Ninth Circuit.

CARL J. SCHIROS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
Southern District of California,
Central Division.

FILED

JUN 16 1950

PAUL P. O'BRIEN,

CLERK

No. 12443

United States
Court of Appeals
For the Ninth Circuit.

CARL J. SCHIROS,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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639 S. Spring St.,
Los Angeles 14, Calif.

For Appellee:

ERNEST A. TOLIN,
United States Attorney,

NORMAN NEUKOM,

RAY STEELE,

LEILA F. BULGRIN,
Assistant U. S. Attorneys,
600 U. S. Post Office &
Court House Bldg.,
Los Angeles 12, Calif. [1*]

* Page numbering appearing at foot of page of Certified Transcript of Record.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

September, 1949, Grand Jury

SEP 21 1949

EDMUND L. SMITH, Clerk

By _____
Deputy Clerk

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARL J. SCHIROs,

Defendant.

No. _____

20908

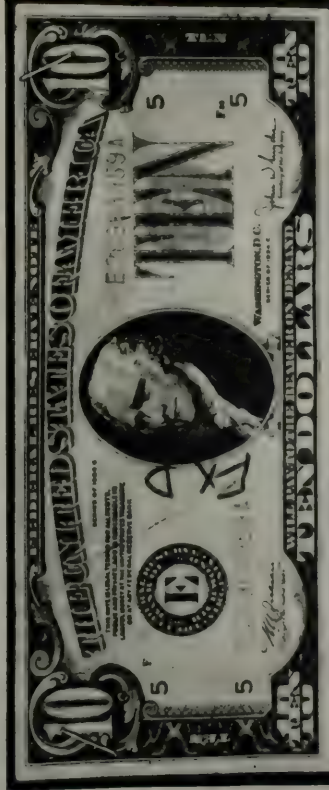
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INDICTMENT

[U.S.C., Title 18, Section 472 -
Uttering and Possessing Counterfeit Bills]

The grand jury charges:

On or about August 26, 1949, at Los Angeles County, California, in the
Central Division of the Southern District of California, defendant CARL J.
SCHIROs with intent to defraud did keep in his possession and conceal
150 falsely made, forged and counterfeited obligations and securities of the
United States, each as follows:



knowing the same to be falsely made, forged, and counterfeited.

COUNT TWO

[U.S.C., Title 18, Sec. 472]

On or about August 26, 1949, at Los Angeles County, California, in the Central Division of the Southern District of California, defendant CARL J. SCHIOS with intent to defraud did pass, utter, publish, and sell and attempt to pass, utter, publish, and sell to John William Wyatt 150 falsely made, forged, and counterfeited obligations and securities of the United States, each as follows:



knowing the same to be falsely made, forged and counterfeited.

A TRUE BILL

James M. Clark
JAMES M. CLARK,
United States Attorney.

James M. Clark
Foreman

RECEIVED

Endorsed : Filed September 21, 1949.



MINUTES OF OCTOBER 3, 1949

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 3rd day of October in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For arraignment and plea: A. P. Moran, Ass't U. S. Att'y, appearing as counsel for Gov't; Wm. A. Larsen, Esq., appearing as counsel for defendant, who is present on bond; appearance praecipe of Attorney Larsen is filed.

Defendant states his true name is as set forth in Indictment, and his attorney having waived reading thereof, defendant pleads not guilty to both counts. Court orders trial set for Nov. 1, 1949, 10 a.m. [5]

United States District Court, Southern District of
California, Central Division

No. 20,908 Criminal

UNITED STATES OF AMERICA,
Plaintiff,
vs.

CARL JOSEPH SCHIROS,
charged as Carl J. Schiros,
Defendant.

VERDICT

We, the Jury in the above-entitled cause, find the defendant Carl Joseph Schiros guilty as charged in Count One of the Indictment; and guilty as charged in Count Two of the Indictment.

Dated: November 2, 1949.

/s/ SAMUEL K. MILLER,
Foreman of the Jury.

[Endorsed]: Filed November 2, 1949. [6]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To the Honorable Court, and the Clerk thereof and
to the office of the United States District
Attorney:

You Will Please Take Notice that on the 14th
day of November at the hour of 2 o'clock in the
afternoon of said date or as soon thereafter as

counsel may be heard, the defendant in the above-entitled action will move the Honorable Court for a new trial for the following reasons:

I.

The verdict is contrary to the weight of the evidence for the following reasons.

1. That the testimony of John Wyatt was so unreasonable as to be unworthy of belief by a jury in light of the fact that the said John Wyatt was an accomplice.

2. That the testimony of John Wyatt should have been entirely discredited by the jury in view of the [7] fact that he was not only an accomplice but had previously been convicted of a charge of counterfeiting, and further, that five of the State's witnesses against the defendant were related to the accomplice John Wyatt in some degree.

3. That testimony regarding the defendant's presence in a restaurant on Whittier Boulevard in the evening of the date of Mr. John Wyatt's arrest did nothing to prove the charges against the defendant and testimony regarding his presence there should not have been introduced.

II.

The verdict is not supported by substantial evidence.

III.

The verdict is contrary to the law:

1. It is evident that the jury disregarded the

Court's instructions regarding the credibility of an accomplice inasmuch as there was no testimony in the instant case, which was material, which tended to connect the defendant with the commission of any offense with the exception of the testimony of John Wyatt, who admittedly had been convicted in the same Court on a counterfeiting charge arising out of the same transaction in which he involved the defendant.

Respectfully submitted,

/s/ WILLIAM W. LARSEN,

Attorney for the Defendant.

Dated at Los Angeles, California, this 9th day of November, 1949. [8]

MOTION FOR A NEW TRIAL

Comes now the defendant, by and through his attorney, William W. Larsen, and moves the Honorable Court for a new trial upon the following grounds:

I.

The verdict is contrary to the weight of the evidence for the following reasons.

1. That the testimony of John Wyatt was so unreasonable as to be unworthy of belief by a jury in light of the fact that the said John Wyatt was an accomplice.

2. That the testimony of John Wyatt should have been entirely discredited by the jury in view of the fact that he was not only an accomplice but had previously been convicted of a charge of coun-

terfeiting, and further, that five of the State's witnesses against the defendant were related to [9] the accomplice John Wyatt in some degree.

3. That the testimony regarding the defendant's presence in a restaurant on Whittier Boulevard in the evening of the date of Mr. John Wyatt's arrest did nothing to prove the charges against the defendant and testimony regarding his presence there should not have been introduced.

II.

The verdict is not supported by substantial evidence.

III.

The verdict is contrary to the law:

1. It is evident that the jury disregarded the Court's instructions regarding the credibility of an accomplice inasmuch as there was no testimony in the instant case, which was material, which tended to connect the defendant with the commission of any offense with the exception of the testimony of John Wyatt, who admittedly had been convicted in the same Court on a counterfeiting charge arising out of the same transaction in which he involved the defendant.

Respectfully submitted,

/s/ WILLIAM W. LARSEN,

Attorney for Defendant.

Dated at Los Angeles, California, this 9th day of November, 1949.

Receipt of copy acknowledged.

[Endorsed]: Filed November 9, 1949. [10]

MINUTES OF NOVEMBER 14, 1949

At a stated term, to wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 14th day of November in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Leon R. Yankwich,
District Judge.

[Title of Cause.]

For sentence on each of the two counts, and for hearing motion of defendant, filed Nov. 9, 1949, for a new trial; Leila F. Bulgrin, Ass't U. S. Att'y, appearing as counsel for Gov't.; Wm. W. Larsen, Esq., appearing as counsel for defendant, who is present in custody;

Attorney Larsen makes a statement. Court orders motion for new trial denied.

Court sentences defendant to two years on each of counts 1 and 2, sentence on count 2 to begin at expiration of sentence on count 1, so that maximum time served shall be four years, as follows:

* * *

Report of Prob. Officer is filed. [11]

District Court of the United States for the
Southern District of California, Central Division

No. 20,908 Criminal

UNITED STATES OF AMERICA,

vs.

CARL JOSEPH SCHIROS,

charged as Carl J. Schiros.

JUDGMENT AND COMMITMENT

Indictment—two counts 18 USC 472

On this 14th day of November, 1949, came the attorney for the government and the defendant appeared in person and by counsel, William W. Larsen, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty each count, and verdict of guilty each count of the offenses of (ct 1) that on or about August 26, 1949, at Los Angeles County, Calif., defendant with intent to defraud did keep in his possession and conceal 150 falsely made, forged and counterfeited obligations and securities of the U. S., each in the likeness of a \$10 Federal Reserve Note, knowing the same to be falsely made, etc.; (ct 2) that on or about said date at said place defendant with intent to defraud did pass, utter, publish, and sell and etc. to John William Wyatt 150 falsely made, forged and counterfeited obligations etc. of the U.S., knowing same to be falsely made as charged in said Indictment, and the court having asked the defendant whether he

has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution of the penitentiary type for a period of two years on count 1, and a period of two years on count 2, said sentence on count 2 to run consecutively to sentence on count 1 so that the maximum time served shall be four years.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed November 14, 1949. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Offense: Violation of Section 472 of Title 18, U.S.C.

Judgment: Two years imprisonment in the Federal Penitentiary on Count I and two years in the

Federal Penitentiary on Count II, the sentence on Count II to begin at the termination of the sentence on Count I. This judgment was rendered on the 14th day of November, 1949.

Defendant confined at present; no bail has been set on appeal pending the date of this notice.

I, the above-named defendant appellant, hereby appeal to the United States District Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated at Los Angeles this 15th day of November, 1949.

/s/ CARL J. SCHIROS,
Defendant Appellant.

/s/ WILLIAM W. LARSEN,
Attorney.

[Endorsed]: Filed November 23, 1949. [13]

[Title of District Court and Cause.]

STATEMENT OF GROUNDS ON APPEAL

Comes now the defendant, Carl J. Schiros and states his grounds on appeal to be as follows:

I.

That the verdict on each count is contrary to the evidence.

II.

That the verdict on each count is contrary to the law.

III.

That the Court erred in denying defendant's Motion for a New Trial.

Dated at Los Angeles, this 15th day of November, 1949.

/s/ CARL J. SCHIROS,
Defendant.

/s/ WILLIAM W. LARSEN,
Attorney.

[Endorsed]: Filed November 23, 1949. [14]

[Title of District Court and Cause.]

DESIGNATION OF RECORD TO BE
USED ON APPEAL

Comes now the defendant Carl J. Schiros and requests the Clerk of the above Court to include the following named documents in the record to be used on the appeal in this case:

1. The Indictment.
2. The Plea of Carl J. Schiros.
3. Transcript of the testimony adduced at the trial.
4. The verdict of the jury.
5. Motion for a New Trial.
6. Rulings of the Court Upon Motion for a New Trial.

7. Judgment and Sentence of the Court.

Dated this 15th day of November, 1949.

/s/ CARL J. SCHIROS,
Defendant.

/s/ WILLIAM W. LARSEN,
Attorney for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 23, 1949. [15]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEY

I hereby substitute David Silverton as attorney in the above-entitled matter for and in place of William W. Larsen.

/s/ CARL J. SCHIROS.

I accept this substitution.

/s/ DAVID SILVERTON.

I consent to said substitution.

/s/ WILLIAM W. LARSEN.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 13, 1949. [16]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 20,908, Criminal

Honorable Leon R. Yankwich, Judge Presiding

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CARL JOSEPH SCHIROS,
Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

November 1, 1949

Appearances:

For the Plaintiff:

RAY M. STEELE and
LEILA F. BULGRIN,
Assistant United States Attorneys.

For the Defendant:

WILLIAM W. LARSEN,
220 Broadway Temple Building,
Los Angeles, California.

* * *

(Whereupon, a jury of twelve were duly
impaneled and sworn.)

(An opening statement on behalf of the plain-
tiff was made by Mr. Steele.)

The Court: Mr. Larsen, do you desire to make a statement?

Mr. Larsen: May we reserve our statement?

The Court: Yes. We will have a short recess, before we begin the taking of testimony. Perhaps, so long as no evidence has been presented, it may be stipulated the usual admonition has been given to the jury.

Mr. Steele: Yes, your Honor.

Mr. Larsen: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, you will withdraw from the courtroom, and the bailiff will show you where our jury room is.

(Short recess taken.)

The Court: The record will show the jury have returned and are in the box, and the defendant is in court with his counsel.

Call your first witness.

Mrs. Bulgrin: Mr. Wyatt. [2*]

JOHN WYATT

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand, please, sir. What is your name, please?

The Witness: John Wyatt.

The Clerk: What is the spelling of your last name?

* Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of John Wyatt.)

The Witness: W-y-a-t-t.

Direct Examination

By Mrs. Bulgrin:

Q. Mr. Wyatt, do you recognize the defendant in this case? A. Yes.

Q. Can you point the defendant out for us?

A. Yes. Right there (indicating).

Q. Which gentleman?

A. The second one from——

Q. Have you met the defendant before?

A. Yes.

Q. Can you tell us when you first became acquainted with him?

A. It was on a Sunday night before the 26th of September.

Q. Where did you see him?

A. In a bar on Florence and Compton. [3]

Q. What was the name of the bar?

A. Top Rail.

Q. Can you tell us approximately what time of day this meeting took place?

A. It was in the evening. I don't know just what time it was, 8:30, 9:00, or maybe 10:00 o'clock; somewhere there.

Q. Was anyone else present at that time?

A. No.

Q. Where were you in the cafe?

A. Sitting at the bar.

Q. What was the occasion of this meeting?

(Testimony of John Wyatt.)

A. I just go in there occasionally for a glass of beer.

Q. Did you have a conversation with the defendant at that time?

A. Yes. I just talked to him, nothing in regards to money. We just struck up an acquaintance.

Q. What was said?

A. Oh, nothing. Just a general—where he came from and where I came from, and what we did for a living, and one thing another.

Q. About what time did you leave the bar?

A. 11:00 o'clock at night.

Q. Did you leave with the defendant?

A. Yes.

Q. Where did you go? [4]

A. I drove him to Manchester and Vermont.

Q. What was the occasion of driving him to Manchester and Vermont?

A. He didn't have any car, and I had my car there, my sister's car there.

Q. Was anything further said? A. No.

Q. When did you next see the defendant?

A. On a Wednesday after Sunday.

Q. Where did you see him?

A. Same place.

Q. Top Rail bar? A. Yes.

Q. And approximately what time of day was that? A. About the same time.

Q. What was the occasion of meeting at the Top Rail bar on that occasion?

(Testimony of John Wyatt.)

A. There was no occasion. I just met him there.

Q. Just happened to meet him?

A. Same way again, yes.

Q. There was no agreement to meet there on Wednesday? A. No.

Q. What time of day did you say that was?

A. That was in the evening, the same time as it was Sunday. [5]

Q. Who else was present?

A. No one that I knew.

Q. There were customers in the cafe?

A. Oh, yes.

Q. Did you have a conversation with the defendant at that time? A. Yes.

Q. What was said?

A. Well, we talked about the money, and I asked him——

Q. What did he say to you, first?

A. Just a chance to make some money, I guess; come up that way.

Q. What did you say?

A. I don't know the exact words. It all developed around making some money, and I did it, that is all.

Q. What else did he say about the money?

A. Nothing that I know of.

Q. Did he tell you how you were to make this money?

A. Just pass it off, that is all.

Q. What kind of money were you passing?

(Testimony of John Wyatt.)

A. Ten-dollar bills.

Q. Did he describe the ten-dollar bills to you?

A. No.

Q. Did he tell you they were real ten-dollar bills? A. No. [6]

Q. What did he say about them?

A. He said they were bad ones.

Q. Did he tell you they were counterfeit ten-dollar bills?

A. I don't know whether he said it that way. They were just bad money.

Q. What else was said between you?

A. That is all.

Q. What time did you leave the bar?

A. About 11:00 o'clock.

Q. Where did you go?

A. I went home.

Q. Did you take the defendant with you?

A. Yes.

Q. What did you do when you got home?

A. He just come in the house and I introduced him to my wife, and stayed about five or ten minutes, and he left by himself.

Q. Did he say he wanted to go home with you?

A. Yes.

Q. Did he say why he wanted to go home with you? A. No reason.

Q. Did he have a car? A. No.

Q. Did you have a car? [7]

A. No, I didn't have the car that night. I just live a few blocks from there. I can't remember

(Testimony of John Wyatt.)

whether it was Sunday or Wednesday I had the car. It was one of the nights I drove him. It could have been Wednesday I drove him to Manchester and Vermont. I can't think of it right now.

Q. What else was said between yourself and the defendant when you got home? Was anything said about the money?

A. Well, we talked about the money on the way home and he just give me the chance to take some of it and meet him the next morning, or Friday morning, and pick it up and see if I could pass any of it.

Q. When did you next see the defendant?

A. Friday morning.

Q. Where did you meet him?

A. Florence and Compton, on the corner.

Q. Is Florence and Compton near the Top Rail bar? A. Yes, it is right close to it.

Q. Was anyone else with you? A. No.

Q. What time of day did you meet him?

A. About 8:30 or 9:00 o'clock in the morning.

Q. Did you have a conversation at that time?

A. Wasn't much conversation. Just give me the money, and I was to meet him there that evening.

Q. What else did he say to you? [8]

A. That is all; nothing.

Q. Did he give you the money at that time?

A. Yes.

(Testimony of John Wyatt.)

Mrs. Bulgrin: I have here an envelope containing four smaller envelopes, which I would like the Clerk to mark as Government's Exhibit No. 1.

Mr. Larsen: May I inquire of your Honor if that is for identification?

Mrs. Bulgrin: For identification.

The Clerk: Government's Exhibit 1 marked for identification.

(The envelope referred to was marked Government's Exhibit No. 1 for identification.)

Mr. Larsen: Thank you.

Mrs. Bulgrin: Your Honor, I would like to have these smaller envelopes inside marked as Government's Exhibits 1-A, 1-B, 1-C, and 1-D.

The Court: As you use them they can be marked. I think we had better not mark them at the present time. Take one of them at a time and have it identified further, and then we will mark it for identification in that manner.

Q. (By Mrs. Bulgrin): Mr. Wyatt, calling your attention to these smaller envelopes—this small envelope which I have in my hand, will you examine the contents?

A. (Witness complies.) [9]

Q. What appears to be in the envelope?

A. Ten-dollar notes.

Q. Are those part of the ten-dollar notes passed to you by the defendant on August 26th at the corner of Florence and Compton?

(Testimony of John Wyatt.)

A. I don't know whether they are the ones; they look like it.

Q. Are they similar to the ones passed to you?

A. Yes.

Q. Will you examine the contents of these three other smaller envelopes?

A. (Witness complies.)

Q. What appears to be in each of those smaller envelopes? A. Ten-dollar notes, the same.

Q. Can you say these are the notes passed to you at that time by the defendant?

A. Well, they look like it. I don't know. All tens look alike to me.

Q. Would you say these are similar to the counterfeit notes passed to you?

A. Similar, yes.

Mrs. Bulgrin: At this time I would like to have these marked for identification as Government's Exhibits 1-A, 1-B, 1-C, and 1-D. [10]

The Court: All right. They will be marked Government's Exhibits 1-A, 1-B, 1-C, and 1-D.

The Clerk: Government's Exhibits 1-A, 1-B, 1-C, and 1-D marked for identification.

(The envelopes, with their contents, above referred to, were marked Government's Exhibits Nos. 1-A, 1-B, 1-C, and 1-D, respectively, for identification.)

Q. (By Mrs. Bulgrin): Mr. Wyatt, at the time the bills were passed to you were there any par-

(Testimony of John Wyatt.)

ticular unusual markings on the bills, that you remember? A. No.

Q. During the time that you became acquainted with the defendant did you own a car of your own?

A. No.

Q. Then each time you used a car was it necessary for you to borrow a car from someone else?

A. Well, I only had the car once. It belonged to my sister. She lived in my house.

Q. Is that at the time of the first meeting or the second meeting?

A. It was the time of the first meeting. It was a Sunday night. I drove the car quite a bit. My sister lived at the house. I usually drove it all the time.

Q. You believe you may have used the car on the Sunday night and on the Wednesday night both?

A. It is possible. I usually had it all the time she wasn't going any place.

Q. Did the defendant have a car with him at any time?

A. Yes, the morning he gave me the money.

Q. That was on Friday morning, August 26, 1949? A. Yes.

Q. Did he take you anywhere in the car?

A. No.

Q. Did you see the car?

A. I just seen him drive off in a car.

Q. Can you describe it?

A. It was a Chrysler product. I don't even know what kind of a car it was.

(Testimony of John Wyatt.)

Q. Did you see him drive up to the place of the meeting in the car? A. No.

Q. You testified, Mr. Wyatt, that on August 26, 1949, these ten-dollar bills were given to you by the defendant. A. Yes.

Q. Can you tell us how many ten-dollar bills were given to you? A. 150.

Q. 150? A. Yes.

Q. Did you count these bills at that time? [12]

A. Yes. I counted them when I got home.

Q. You counted them when you got home?

A. Yes.

Q. Now, when you left the defendant, what did you do? A. I went home.

Q. On the morning of August 26th?

A. I went home and talked to my wife about it, and——

The Court: You cannot tell us what she said or you said to her, unless you reported the conversation later on to the defendant. If you did, then you may repeat it.

The Witness: Well, I went home and we borrowed a car.

Q. (By Mrs. Bulgrin): Did you tell your wife what had transpired between you and the defendant? A. Yes.

Q. Did you tell her that he had given you——

The Court: Just a moment.

Mr. Larsen: We will object.

The Court: I just forestalled that. He cannot testify as to what she told him or he told her. That

(Testimony of John Wyatt.)

is what I am trying to avoid. You are trying to bring it in. He cannot tell his conversation with his wife.

Q. (By Mrs. Bulgrin): What did you do after you got home?

A. I borrowed an automobile and started to go around to the different stores, passing the ten-dollar bills. And my wife was picked up. [13]

Q. Was your wife with you at that time?

A. Yes.

Q. Can you tell me how many ten-dollar bills were passed by you?

A. Well, I really don't know. I think there is \$483.00 change that we got back from the ones that we had passed. They had them on file here. Mr. Carter there (indicating) could tell you how many were there.

Q. How many bills did you pass personally?

A. Well, that I have no way of knowing. I mean, I just kept going from one place to another. I never kept track of them at all. The money is all in the Secret Service. The Secret Service men have the good and the bad money. They can find exactly how many I passed.

Q. How long did you pass these bills?

A. Just about five hours, five and a half hours.

Q. What happened after you stopped passing them?

A. Well, they arrested my wife and took her to jail in Pasadena, and I surrendered myself to

(Testimony of John Wyatt.)

Secret Service men on Monday after Friday of the 26th.

Q. Now, at the time the money was passed to you by the defendant on the morning of August 26th, did you note the license number on the car he drove away in? A. Yes.

Q. Do you recall what that number is now?

A. 38-M-900.

Q. At any time during your conversations with the defendant, that you have mentioned in court this morning, did you tell him about a restaurant owned by John Didier? A. No.

Q. You didn't mention that restaurant?

A. No.

Q. Mr. Wyatt, where are you at the present time? A. County Jail.

Q. Have you been sentenced for your participation in this? A. Yes.

Q. What was the sentence?

The Court: Just a moment. That does not matter. Do not bring that out. Let counsel for the defendant bring it out if he wants to. It is no concern of this jury what happened to him.

Mrs. Bulgrin: That is all.

Cross-Examination

By Mr. Larsen:

Q. Mr. Wyatt, at the time that you first met the defendant Schiros were you employed?

A. Yes.

Q. What was your business or occupation at that time? A. Painter. [15]

(Testimony of John Wyatt.)

Q. This was on a Sunday night immediately preceding August the 26th, is that correct?

A. Yes.

Q. It would be approximately August 21st?

A. Yes.

Q. You met him, you would say, sometime between 8:00 and 10:00 that evening? A. Yes.

Q. The meeting transpired in a cocktail bar, the name of the bar being the Top Rail, is that right?

A. Yes.

Q. Were you introduced to the defendant?

A. No.

Q. How did you chance to first talk to him?

A. I just sat down beside him in the bar, is all.

Q. He was already in the bar? A. Yes.

Q. What was he doing?

A. Just drinking.

Q. Who spoke first, did you or he?

A. I don't know who spoke first. Just struck up an acquaintance. I can't remember how it came about.

Q. Well, what were the first words you said to each other?

A. As much as I can recall, we just talked about states we had come from and what we were doing for a living, and one thing another.

Q. Did he ask you what your business or occupation was? A. Yes.

Q. You told him? A. Yes.

Q. Did you ask him what his business or occupation was?

(Testimony of John Wyatt.)

A. No. He didn't say. That never arose.

Q. You didn't ask him? A. No.

Q. Did you ask him where he lived?

A. No, I never knew where he lived.

Q. Did you ask him if he had any family?

A. No.

Q. When was the topic of money first introduced between you? A. Wednesday night.

Q. Following the Sunday when you first met?

A. Yes.

Q. Now, Wednesday night you just chanced to meet in this bar again? A. That is right.

Q. You had made no previous arrangement to meet? A. No arrangement.

Q. Wholly and completely a chance meeting, is that [17] right? A. That is right.

Q. What time did you meet on Wednesday night?

A. Same time as Sunday, between 8:00 and 10:00 sometime.

Q. Who got there first, you or Mr. Schiros?

A. I was there first.

Q. He came and sat down next to you?

A. That is right.

Q. What was the conversation at that time?

A. About the same as the rest, only he brought up the money at that time. We talked about money.

Q. What did you talk about first?

A. Just talked about—spoke to him. I don't know just what.

(Testimony of John Wyatt.)

Q. What was the first that was said about money? What were the first words?

A. Well, he told me about the money that could be made, make some easy money, that is all.

Q. Who said that?

A. Jim, or Carl. I knew him by "Jim."

Q. What did you say?

A. Well, I foolishly was interested in it.

Q. What did you say?

A. I said I would like to have some of it.

Q. Then what did he say? [18]

A. He said he could arrange it.

Q. What did you say?

A. I didn't say any more, just made the arrangements. He come down to the house. He come down to the house and he arranged to meet me on a Friday morning and give me the money.

Q. How long in point of time did you and the defendant talk Sunday evening?

A. How long did we talk Sunday evening? An hour and a half, two hours.

Q. How long did you talk Wednesday evening before the subject of money was brought up?

A. Same amount of time.

Q. Then, after talking generally for an hour and a half or two hours on Wednesday evening, Mr. Schiros brought up the subject of money?

A. That is right.

Q. After you had said you would like to get some of this easy money, what did he say?

(Testimony of John Wyatt.)

A. He told me that he would meet me on Friday and I could try to get rid of some of it.

Q. Did he say how you were to make this easy money?

A. Oh, yes, he told me about the ten-dollar bills.

Q. What did he say about them?

A. He said he had some bad ten-dollar bills, and to pass them on a 60-40 basis. [19]

Q. What did you say to that?

A. I said I would take some of them.

Q. After that he drove you home or you drove him home?

A. I only drove him one time, to Manchester and Vermont. I can't remember now whether it was Sunday or Wednesday. I think it was Sunday night. The other night we just went to my house. I live a few blocks from there. He come to the house and was probably in there 15 minutes altogether.

Q. While he was in the house did he talk about this money? A. No.

Q. Did you ever hear him talk to your wife about the money?

A. No, he never talked——

Q. His entire conversation was with you, is that correct? A. That is right.

Q. No question or no conversation was had regarding money the first night you met him?

A. No.

Q. Do you remember confronting the defendant

(Testimony of John Wyatt.)

in this building shortly after the defendant was first arrested?

A. I never seen him after he was arrested.

Q. You didn't talk to him at all?

A. Never. [20]

Q. It is not true that you have previously said that you and the defendant talked about this counterfeit money the first night you met?

A. No.

Q. In other words, it wasn't until after you talked to him for approximately three hours all told that the subject of money came up?

A. That is right.

Q. During the Sunday night conversation did you tell the defendant where you lived?

A. Yes.

Q. Did you tell him who you worked for?

A. Yes—no, I don't think he knows who I work for yet. I just told him I was a painter.

Q. Did you tell him how much you made?

A. I think so.

Q. Did he ask you how long you had lived in Los Angeles? A. Yes.

Q. Did he ask you who your friends were?

A. No.

Q. Did he ask you how much family you had?

A. Yes.

Q. Did he ask you if you had ever had any experience with the law? A. Yes. [21]

Q. Now, on the next night you met, did he go

(Testimony of John Wyatt.)

into these questions again regarding your work and your family?

A. No, not very much. Nothing, except only I guess he wanted to meet the family or see where I lived, or something.

Q. Do you remember whether you took the defendant to your home on Sunday night or Wednesday?

A. It was Wednesday night when he came to the house.

Q. In other words, Wednesday night was the first the defendant ever went to your home?

A. Yes.

Q. That was after he had approached you on the proposition of making some money?

A. It was the same night, yes.

Q. Previous to the time that the defendant asked you about making some easy money, all the conversation had just been between the two of you?

A. Yes.

Q. With no mutual friends present?

A. Nobody was present.

Q. Had you told him the names of any of your friends? A. None.

Q. Had he asked you for any references?

A. None.

Q. As a matter of fact, up until Wednesday night you hadn't even told him the address of your house, had you? [22] A. That is right.

Q. Very well. Now, then, directing your attention to these bills which are the prosecution's

(Testimony of John Wyatt.)

first exhibit for identification, when did you first see them?

A. On Wednesday at the bar. He had one of them then.

Q. I see. Did you examine it at that time?

A. Yes, I looked at it.

Q. Did it appear to you to be in any way irregular?

A. No, I couldn't tell the difference. I mean, it looked good to me. The only reason I knew it was bad is he said it was bad. I don't know whether it was bad or good; I don't know.

Q. When you received this parcel or package, whatever it was, of 150 bills, were those enclosed in some wrapping substance of some kind?

A. Yes.

Q. How were they wrapped?

A. Piece of newspaper.

Q. All the 150 were together? A. Yes.

Q. They weren't sorted in parcels as they are now? A. Yes.

Q. You would not say to this jury now, would you, that those are the same 150 bills that you received?

A. I couldn't say that, because I never looked at them [23] that close. It could be good ten-dollar bills I looked at here. I don't know.

Q. They just appear similar to other ten-dollar bills, isn't that right?

A. That is correct.

(Testimony of John Wyatt.)

Q. You have no way whatsoever of identifying them, do you?

A. No, I never looked at them that close.

Mr. Larsen: That is all, your Honor.

The Court: Do you have any redirect examination?

Mrs. Bulgrin: Yes, sir.

Redirect Examination

By Mrs. Bulgrin:

Q. Mr. Wyatt, will you tell us something else about the arrangements that were made for your share of the proceeds from the passing of the ten-dollar bills?

A. The only thing that was said was 60-40.

The Court: How was it to be paid?

The Witness: I was to meet him and pay him on the corner of Florence and Compton.

The Court: When?

The Witness: As soon as I got rid of it, on Friday night, Friday evening, which would have been \$900.00 to him and I had the rest out of the \$1,500.00.

The Court: Who was to get the long end? [24]

The Witness: The defendant.

The Court: He was to get the 60?

The Witness: Yes. We had merchandise and what was left of the money, if we would have done it, but the Government has the money. We didn't do anything with it.

(Testimony of John Wyatt.)

The Court: Were you to pass these bills by making purchases in stores?

The Witness: Yes. We made small purchases in stores, from Alhambra, El Monte, Pasadena, and a few places, small places.

Q. (By Mr. Bulgrin): That is the way they were passed by you? A. Yes.

Q. Now, can you describe the front of the Top Rail bar for us, Mr. Wyatt?

A. Well, it is a bar with a big neon light on it, with a cowboy throwing a rope, and the neon light makes the rope, the lariat, move. There is a little hot dog stand open to the public at the sidewalk.

Q. Is the glass on the front of the bar colored or is it possible to see through it easily?

A. You can't see through the front of the building into the bar, only through the hot dog stand.

Q. You can see through the hot dog stand into the Top Rail bar? [25]

A. Yes. Just a certain spot you can see into. I don't know how much you can see. I never tried to look.

Q. Do you know whether it is possible to see the bar from that point or not?

A. Well, probably the center of the bar, you could see two or three people sitting there, yes.

Q. During the occasion of these conversations you have mentioned, did the defendant tell you what his name was?

A. He told me his name was Jim.

(Testimony of John Wyatt.)

Q. Was he known by you as Jim during the time you were acquainted with him?

A. That is all, yes. Three days.

The Court: He never told you his last name?

The Witness: No, I never heard of his name until he was arrested.

Q. (By Mrs. Bulgrin): Mr. Wyatt, when the defendant accompanied you to your home on Wednesday evening, who was present at that time?

A. Who was present at the house?

Q. Yes. Were you?

A. My wife, children, my sister and her two daughters, I believe. That is about all.

Q. How many children were present?

A. Well, I have five children. I think three of them were home at the time. [26]

Q. You didn't discuss the deal you made with the defendant?

A. No, I never told anybody about it until after I had the money, and the only one I told was my wife.

Q. You say your sister was present?

A. Yes.

Q. Do you know where she is now?

A. No, I don't.

Q. What is her name?

A. Eleanor Shaw.

Q. Are you acquainted with Marie Taylor?

A. Yes, I know Marie Taylor.

Q. Do you know where she is now?

A. No, I don't.

Mrs. Bulgrin: That is all.

Mr. Larsen: That is all, your Honor.

The Court: All right. That is all.

(Witness excused.)

Mr. Steele: Mrs. Wyatt.

The Court: There is one statement I desire to make for the benefit of the jury, and that is about the question of punishment. The reason I did not allow Mr. Wyatt to answer the question as to punishment is because you are not concerned with the problem of punishment at all. That is up to the court. As a matter of fact, I sentenced this witness, Mr. [27] Wyatt.

Counsel had every right to ask him whether there is a case pending against him or what the status of it is, because that may affect his credibility as a witness or go to his bias or interest in the outcome of the case.

What punishment he received is not material at all. That is why I sustained the objection. We are not trying to conceal anything from you, but there are certain things you have a right to hear and certain things you do not.

BONNIE RUTH WYATT

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Bonnie Ruth Wyatt.

(Testimony of Bonnie Ruth Wyatt.)

Direct Examination

By Mr. Steele:

Q. You are the wife of John Wyatt?

A. Yes, I am.

Q. How long have you been married, Mrs. Wyatt?

A. Seven years.

Q. Have you seen the defendant before?

A. Yes, sir.

Q. Would you point out for the benefit of the jury which of these persons is the defendant?

A. The middle one (indicating). [28]

Q. The man with the jacket, is that correct?

A. Yes, sir.

Q. Where did you first see the defendant?

A. In my home.

Q. Where is your home?

A. 7219 Whitsett.

Q. In Los Angeles?

A. Yes, sir.

Q. What day was that, if you remember?

A. It was on a Wednesday.

Q. What month?

A. August.

Q. This year?

A. Yes, sir.

Q. About what time of the day was that?

A. Around 10:30 or 11:00 o'clock at night.

Q. Were you there when the defendant appeared at your home?

A. Yes, sir.

Q. Who was with you, if anybody?

A. My husband.

Q. Who else was in the home at the time?

(Testimony of Bonnie Ruth Wyatt.)

A. My sister-in-law, my children and her children.

Q. Were you introduced to the defendant at that time? A. Yes, sir. [29]

Q. What was the name by which the defendant was introduced to you? A. Jim.

Q. Did you have any conversation with the defendant? A. Not much.

Q. Did the defendant have any conversation with anyone in your presence there?

A. No, not much of anything.

Q. Was there any mention of money?

A. No, sir.

Q. Do you recall how the defendant arrived, that is, by what means he arrived at your house?

A. When he come with my husband?

Q. Were they walking or riding?

A. I believe they were walking. I believe my sister-in-law had the car that night.

Q. How far is it from your home, if you know, to this Top Rail bar?

A. I would say about ten blocks.

Q. Now, directing your attention to Government's Exhibits 1-A, 1-B, 1-C and 1-D for identification, I would like to have you examine those exhibits, if you will, please. I refer to the contents of the envelopes. A. Ten-dollar bills.

Q. Have you seen anything like that before?

A. They are ten-dollar bills. I have seen ten-dollar bills before.

(Testimony of Bonnie Ruth Wyatt.)

Q. Could you state whether or not those are the ten-dollar bills, or that you have seen those particular ten-dollar bills before?

A. Well, I guess I have if they are the ones I have had. I couldn't swear they are exactly the same ones.

Q. You don't know, of your own knowledge, whether those are ten-dollar bills you have had in your possession before? A. No, I don't.

Q. Now, on the 26th of August, do you recall having in your possession a quantity of ten-dollar bills?

A. Yes, sir.

Q. Will you tell the jury how that came about?

A. How I got the money, you mean?

Q. Yes.

A. I got it through my husband. My husband gave it to me.

Q. What time of the day was that?

A. It was in the morning, around 9:00, 10:00 o'clock, something like that.

Q. Where were you when he gave you the money?

A. I was in the kitchen of our home.

Q. Had your husband been home that morning or had he [31] come from somewhere?

A. He had been home, and he got up and left, and then he came home again.

Q. Then he showed you this money?

A. And then he showed me the money.

Q. What did you do with the money, if anything?

A. I took it out and distributed it.

(Testimony of Bonnie Ruth Wyatt.)

Q. Would you go into a little more detail, please?

A. Well, I took the money and went from store to store and bought small items and took the change.

Q. How did you get from store to store?

A. With my husband. We borrowed my brother-in-law's car.

Q. Who is your brother-in-law? What is his name? A. Chester Morris.

Q. Did you pass these notes all in the same locality? A. No, sir.

Q. Just where, if you recall, did you take them?

A. El Monte, Alhambra, Pasadena.

Q. Just tell the jury what transpired during the events of that afternoon, that day.

A. I don't understand.

Q. You say you passed the bills. A. Yes.

Q. Well, when did you stop? [32]

A. Well, I stopped when I got caught.

Q. Where were you caught?

A. Nash's Department Store in Pasadena.

Q. Was your husband with you then?

A. He wasn't with me, no.

Q. Where was the car at that time?

A. It was on the street.

Q. Did the car remain on the street or was it gone when you went back?

A. No, it was there when I went back.

Q. Who was with you when you went back?

A. A policeman.

Q. That is, after you had been arrested?

(Testimony of Bonnie Ruth Wyatt.)

A. Yes, sir.

Q. What happened to the car at that time?

A. Well, so far as I know, the policemen got it.

Q. The policeman got it? A. Yes.

Q. Did anyone open the car?

A. Not to my knowledge.

Q. You weren't present when anyone opened the car? A. No, sir.

Q. When you left the car in Pasadena, was your husband in the car? A. No, sir. [33]

Q. Did you leave with him?

A. I left the car with him, yes.

Q. Did you leave any of these bills in the car when you left the car? A. I believe so.

Q. You don't know how many you left in the car? A. No, sir.

Q. How many did you take with you, if you recall? A. You mean on myself?

Q. Yes, when you left the car in Pasadena.

A. I think they took 17 off of me; I am not sure.

Q. Do you know how many your husband had with him when he left the car? A. No, sir.

Q. But you do know that some were left in the car, is that correct? A. Yes, sir.

The Court: How many did you start with, do you remember? You say they took 17 from you that you had not cashed. How many did you have when you started?

The Witness: I don't know, sir. I mean, I didn't count them. My husband just gave me a few and I just took them.

(Testimony of Bonnie Ruth Wyatt.)

Q. (By Mr. Steele): You never told how many bills there were? A. No, sir. [34]

Q. Do you know Marie Taylor?

A. Yes, sir.

Q. Do you know where she is now?

A. No, I don't.

Q. On August 26th, do you know where she lived?

A. No. I know she lived not far from us. I don't know the address.

Q. Do you know Eleanor Shaw?

A. Yes, I do.

Q. Do you know where she lived on August 26th?

A. She lived with me.

Q. With you? A. Yes, sir.

Q. Do you know where she is now?

A. No, I don't.

Mr. Steele: That is all. You may cross-examine.

Cross-Examination

By Mr. Larsen:

Q. Mrs. Wyatt, I take it then from your testimony you cannot identify any of these bills as being bills that you actually had in your possession on August 26th? A. That is right.

Q. They look like any other ten-dollar bill to you, is that correct? A. Yes, sir. [35]

Q. I don't like to ask this question, Mrs. Wyatt, but it is necessary for me to do so: Did you plead guilty to an offense involving counterfeit money?

(Testimony of Bonnie Ruth Wyatt.)

A. Yes, sir.

Mr. Larsen: That is all.

Mr. Steele: Have you been sentenced for that offense?

The Witness: Yes, sir.

The Court: I will bring out the facts.

I gave you probation, did I not?

The Witness: Yes, sir.

The Court: All right.

(Witness excused.)

The Court: Call another witness.

I will have to run into the noon hour because of the other civil matter I have to hear.

Mr. Steele: All right.

The Court: There is one question I do not think either of you asked. Nobody asked Mrs. Wyatt whether she was present when any discussion was had about dividing the money.

Mrs. Wyatt, you were not present at any discussion between your husband and the defendant?

Mrs. Wyatt: No, sir.

Mr. Steele: Mr. Didier. [36]

JOHN D. DIDIER

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: John D. Didier.

(Testimony of John D. Didier.)

Direct Examination

By Mr. Steele:

Q. What is your occupation?

A. Restaurant owner.

Q. Where is your restaurant located?

A. It is 10714 East Whittier Boulevard, Whittier.

Q. Were you a restaurant owner on August 26th of this year? A. I was.

Q. Were you present at your restaurant on that day?

A. Off and on, most of the day, yes, sir.

Mr. Larsen: I beg your pardon. What was the date, counsel?

Mr. Steele: August 26th of this year.

Q. (By Mr. Steele): Who are your employees there? Or let's strike that question.

Who were your employees on August 26th of this year?

A. Well, I would have to look up the pay-roll book to tell you definite.

Q. Who was your bartender at that time? [37]

A. Well, there was Chester Morris and Carl Miller bartending.

Q. Who were the waitresses?

A. Mary Morris. Mary Morris was a waitress. And Ruth Fickett.

Q. Are you your own cook or chef, or have you a cook? A. I had a cook at that time.

(Testimony of John D. Didier.)

Q. Who was the cook?

A. Mrs. Ruth Shope.

Q. Have you seen the defendant before?

A. I believe I seen him in there one evening, yes.

Q. Do you recall the day?

A. Well, I don't. I couldn't recall the day, whether it was—it was the day that they was picked up in Pasadena. I know that definitely.

Q. It was the day of the arrest of Mrs. Wyatt?

A. Yes.

Q. About what time of the day did you see the defendant in the restaurant?

A. It was in the evening, I would say around—between 6:00 and 7:00 o'clock.

Q. Are you customarily in the restaurant in the evening? A. Practically every evening, yes.

Q. Had you ever seen the defendant there before? [38] A. Never had.

Q. Was the defendant alone or was he accompanied by others?

A. No. He was accompanied with others.

Q. Do you recall who the persons were that he was with, if you know?

A. I wouldn't know them. There was a couple of ladies with him. Who they were, I don't know.

Q. How long was the defendant there?

A. Well, I wouldn't know. He was there when I got there and I don't think he was there over an hour after I got there.

Q. Did you observe the defendant was being served? Was he eating or just drinking?

(Testimony of John D. Didier.)

A. Well, he was doing both. What I observed about him was sort of a nervous type, getting up and going out and in. That is why I noticed the man more than I would have anyone else.

Q. Did you see the defendant after that date, at any time? A. Never have.

Q. Did you have any conversation with the defendant? A. No, sir.

Q. Did you overhear any conversation he had with anyone else at that time? [39]

A. No, never did.

Q. Did you observe the defendant leave?

A. No, I didn't see how he left or with who.

Q. Did you observe any of your employees conversing with the defendant?

A. Well, he was setting at the table. I think Mary, the waitress, was waiting on him. It is sort of a relative bunch there. I couldn't say what the conversation was.

Q. You saw there was a conversation?

A. What the conversation was I wouldn't know.

Mr. Steele: That is all. You may cross-examine.

Mr. Larsen: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Steele: Your Honor, this witness would like to be excused.

The Court: Surely. He may be excused and go about his business.

(Testimony of Ruth Shope.)

Q. With the jacket? A. Yes.

Q. Where did you see him?

A. At the cafe.

Q. Now, what time of the evening was it that you saw him?

A. Well, I would say it was between 6:30 and 7:00 o'clock.

Q. Can you tell us who was present at that time?

A. Well, naturally, it was a cafe and there were lots of people there.

Q. Was there anyone with the defendant?

A. Yes.

Q. Do you know who was with the defendant?

A. Yes.

Q. Will you tell us who it was? [43]

A. Yes. Eleanor Shaw and Marie Taylor.

Q. At that time were you introduced to the defendant?

A. At that time, and the only time I ever met him, I was introduced to him as Jimmie.

Q. You were introduced as what?

A. Jimmie.

Q. You had never seen the defendant before that time? A. Never before.

Q. Can you give us the hours, Mrs. Shope, you worked in the cafe?

A. Well, yes, I almost made it my headquarters. I went at 11:00 in the morning and was there until about 2:00 in the morning.

Q. Were you customarily there in the evening from 5:00 to, say, 8:00? A. That is right.

(Testimony of Ruth Shope.)

Q. You had never seen the defendant in that cafe before? A. No.

Q. Did you have any further conversation with the defendant at that time?

A. No, not with him, particularly.

Q. Mrs. Shope, did you see John Wyatt at the cafe that night?

A. Yes, I saw him that night. [44]

Q. Approximately what time did you see him?

A. Well, I don't remember seeing Johnny until about 10:00 o'clock.

Q. Can you tell us what he was doing?

A. Well, he just came in and I was in the kitchen, and when I came out of the kitchen he was talking to my daughter Mary.

Q. At the time you saw the defendant, did you also see Mr. Morris working at the bar?

A. Yes. Mr. Morris was at the bar.

Mrs. Bulgrin: I believe that is all.

Cross-Examination

By Mr. Larsen:

Q. Mrs. Shope, had you known Mr. Wyatt prior to that evening?

A. Mr. Wyatt is my son-in-law.

Q. Had you known Miss Taylor prior to that evening? A. Yes, I had.

Q. Is she any relation to you? A. None.

Q. Had you known Miss Shaw prior to that evening? A. Yes.

(Testimony of Ruth Shope.)

Q. Is she any relation to you?

A. No, not to me.

Q. Did you see any person with the defendant, other [45] than Miss Shaw and Miss Taylor?

A. No.

Q. How long previous to that evening had you known Miss Shaw?

A. I have known Miss Shaw for 15 years.

Q. Will you describe her appearance, please?

A. Well, she is a heavy-set woman about 180, I would say, something like that; a little shorter than I am, and heavy-set. Very nice appearing woman.

Q. How old would you estimate her to be?

A. About 39, I would say.

Q. What about Miss Taylor, would you describe her?

A. She was a much larger woman, taller.

Q. Larger than 180?

A. Yes, I would say; pretty close to 200.

Q. How old would you say she was?

A. I would say she ranged in about the same age, maybe a year or two younger.

Q. You didn't see another man in the company of these two girls and the defendant that evening?

A. No, I didn't.

Q. Where was the defendant with these two girls? A. At a table in the cafe.

Q. Eating?

A. No, they just had a few drinks. [46]

Q. During the time they were there, did Mr. Wyatt come in? A. No.

(Testimony of Ruth Shope.)

Q. How much later was it that he came in?

A. Well, like I say, I saw the defendant and the girls about 6:30 or 7:00, and I didn't see Johnny until about 10:00.

Q. Did the defendant and the girls come in together, or do you know?

A. I don't know. I was in the kitchen, but when I came out they were sitting at the table.

Q. Did you see anyone or all of them depart?

A. Yes, they all left together.

Q. They left together? A. Yes.

Q. There still was no man with them?

A. No.

Q. At any time that evening did you see a man known to you by the name of Joe? A. Never.

Q. With Miss Taylor or Miss Shaw?

A. No.

Q. Within a week previous to the 26th did you see Miss Taylor or Miss Shaw in that restaurant with a man known to you by the name of Joe?

A. No. [47]

Q. Did you know an individual by the name of Joe who was keeping company with either one of these two young ladies? A. No.

Q. Do you know whether or not your son-in-law was a friend of this man?

A. I don't know. I never heard of a Joe.

Mr. Larsen: That is all.

(Testimony of Ruth Shope.)

Redirect Examination

By Mrs. Bulgrin:

Q. Just a couple of questions. On August 26, 1949, Mrs. Shope, were either of those two girls living at your house? A. Not at my house, no.

Q. Do you know where they are at the present time? A. No, I don't.

Mrs. Bulgrin: That will be all.

Mr. Larsen: Just a moment, your Honor. This is not strictly recross-examination. There are two questions.

The Court: Do not argue about it. You are taking time. I have not stopped you.

Mr. Larsen: Did you know a party by the name of Phil Balentine?

The Witness: No.

Mr. Larsen: Who was keeping company with Miss Shaw or Miss Taylor? [48]

The Witness: No.

Mr. Larsen: Who was a friend of your son-in-law?

The Witness: No.

Mr. Larsen: That is all.

The Court: Step down. You may be excused.

(Witness excused.)

The Court: Call your next witness.

Mr. Steele: Mrs. Morris.

MARY GERTRUDE MORRIS

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Mary Gertrude Morris.

Direct Examination

By Mr. Steele:

Q. Where do you live, Mrs. Morris?

A. 7502 Dixie Drive, in Whittier, California.

Q. Where are you employed presently?

A. I am not employed now.

Q. Were you employed August 26th of this year?

A. Yes, sir.

Q. Where were you employed?

A. Johnny's Cafe.

Q. Is that the cafe of Mr. Didier?

A. Yes. [49]

Q. In Whittier?

A. Yes.

Q. You were employed there as a waitress?

A. Yes.

Q. Have you seen the defendant before?

A. Yes.

Q. When did you first see the defendant, if you recall?

A. The night of August 26th?

Q. Where?

A. At Johnny's Cafe.

Q. Was he a customer there?

A. Yes.

Q. Did you serve him?

A. Yes.

Q. What did you serve him?

A. I served him two glasses of beer.

(Testimony of Mary Gertrude Morris.)

Q. Did you observe him when he arrived at the restaurant? Did you see him come in, that is?

A. No.

Q. Was he there when you went to work?

A. No.

Q. He came in sometime then while you were engaged in your duties as a waitress?

A. Yes.

Q. That evening? [50] A. Yes.

Q. Was he accompanied by anybody?

A. Two women.

Q. Do you know who they were? A. Yes.

Q. Who were they?

A. Eleanor Shaw and Marie Taylor.

Q. Were you acquainted with Eleanor Shaw?

A. Yes.

Q. Do you know Marie Taylor? A. Yes.

Q. Did you have any conversation with the defendant that evening?

A. No. I was just introduced to him.

Q. Who introduced you to him?

A. Eleanor.

Q. Do you know where Eleanor Shaw is now?

A. No.

Q. Do you know where Marie Taylor is now?

A. No.

Q. If you know, where was Eleanor Shaw living at that time?

A. I believe she was living with my sister.

Q. Did you observe the defendant leave the restaurant?

(Testimony of Mary Gertrude Morris.)

A. Yes. He left with Eleanor and Marie. [51]

Q. About what time was that, if you recall?

A. I would say about 7:30 or 8:00.

Q. Did you observe John Wyatt come in that evening?

A. No, not until about 10:00.

Q. He came in later on in the evening?

A. Yes, about 10:00.

Q. How was the defendant introduced to you?

A. As Jimmie.

Q. Do you know his last name? A. No.

Q. Had you ever seen the defendant there before?

A. No, I hadn't.

Q. How long had you worked there prior to August 26th?

A. About two or three months.

Mr. Steele: That will be all.

The Court: Cross-examination

Cross-Examination

By Mr. Larsen:

Q. Mrs. Morris, you were employed as a waitress?

A. Yes, sir.

Q. It was your husband who was the bartender?

A. Yes.

Q. Did you have any other relatives connected with this cafe?

A. My mother. [52]

Q. Who is she? A. Mrs. Shope.

Q. The lady who just testified? A. Yes.

Q. How long had you known these young ladies, Miss Shaw and the other lady?

A. I have known Eleanor for a long time.

Q. How long?

(Testimony of Mary Gertrude Morris.)

A. About as long as my mother has, about 15 years.

Q. Are they related in any way? A. No.

Q. Mr. Wyatt must be some relation of yours, is that right?

A. Mr. Wyatt is my brother-in-law.

Q. Mr. Wyatt is your brother?

A. My brother-in-law.

Mr. Larsen: Thank you, Mrs. Morris.

The Court: All right. Now we have all the family straightened out. Step down.

(Witness excused.)

The Court: Call your next witness.

All the witnesses may be excused when they are through.

Mr. Steele: Mr. Carli. [53]

VICTOR D. CARLI

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Victor D. Carli.

Direct Examination

By Mr. Steele:

Q. What is your occupation?

A. Agent, United States Secret Service.

Q. Were you so employed on August 26th of this year? A. Yes, sir.

(Testimony of Victor D. Carli.)

Q. How long have you been with the Secret Service, Mr. Carli?

A. About twelve and a half years.

Q. I place before you Government's Exhibit No. 1 for identification. It includes A, B, C, and D. Would you examine that exhibit, please?

A. (Witness complies.)

Q. Have you examined all of them?

A. I went through them, yes. They all have my initials on them.

Q. Have you seen those items before?

A. Yes, sir, I have.

Q. Where did you first see them?

A. These here were found in an automobile, in a [54] Studebaker President automobile with Indiana license plates, in Pasadena, California, on Raymond Avenue near Colorado Boulevard.

Q. Were they found there by you?

A. With other agents and police officers of the Pasadena Police Department.

Q. Who else was present, if you can recall, when they were found?

A. Agents George Schnelbach from our office and Fred C. Wasson, the agent in charge, from the Secret Service office, and Clifton Wright of the police detectives of the Pasadena Police Department.

Q. When were they found?

A. On the evening of August 26, 1949.

Q. Will you tell the jury the circumstances under which you obtained these items?

(Testimony of Victor D. Carli.)

A. We had proceeded to Pasadena Police Department on a call that they had.

The Court: You cannot tell what they told you. You must say that you got directions to do something. Tell us what you did.

The Witness: We proceeded to Pasadena Police Department, and there we interviewed Bonnie Ruth Wyatt.

The Court: That is where you started.

The Witness: And she was then under arrest for passing [55] counterfeit notes. In questioning her she told us she had driven the automobile car in company with another person whose name she would not reveal at the time, and that the car was down on Raymond Avenue, and that there were some more counterfeit notes in the car.

Q. (By Mr. Steele): What did you do then?

A. With the aforementioned persons we went down to the car and we forced the door open.

Q. The car was locked?

A. The car was locked, yes, sir. We forced the door open and found these counterfeit ten-dollar notes in the car.

Q. They are counterfeit ten-dollar notes?

A. Yes, sir.

Q. What is there about the note which reveals it is counterfeit in nature, to you? First, I will strike that question.

You have had occasion in the course of your service to examine notes before, have you, to deter-

(Testimony of Victor D. Carli.)

mine their nature, whether counterfeit or genuine?

A. Yes, sir.

The Court: All of you gentlemen have taken a course, is that not a fact? When you begin work in the Department and are assigned to that work, you take a course?

The Witness: Yes.

The Court: Which aims to acquaint you with the various [56] methods of detecting flaws in bills, is that true?

The Witness: That is correct.

The Court: All right.

Q. (By Mr. Steele): What is there about these notes which reveals to you their counterfeit nature?

A. In the first place, these bills here all have the same serial number, which is not so on genuine bills.

Q. No two genuine bills have the same serial number, is that correct?

A. That is correct. Also, these bills are not printed on the genuine government paper. They don't have the silk fibers as you would see in the genuine paper put out by the Government.

Also, the printing on the notes is not in conformity with the genuine notes. The notes are not clear. They are smudgy. The back of the note is not clear. I can tell right away by looking at it it is not genuine, by experience.

The Court: Can you tell by what process this was printed?

(Testimony of Victor D. Carli.)

The Witness: It appears to be lithographed.

The Court: It is not a photo?

The Witness: Photo-engraving process. They are all made that way. That is how they make their plates. The printing is lithograph.

The Court: Wherein does that differ from the Government's [57] method?

The Witness: The printing of the Government is made by a flat-bed press. In other words, they are made by intaglio plates.

Q. (By Mr. Steele): Have you seen this man before? A. Yes, I have.

Q. Where did you first see him?

A. On August 29th in our office in the United States Secret Service in this building here.

Q. He appeared in your office?

A. Yes. He was surrendered to us by his attorney.

Q. Did you see the defendant before today?

A. Yes.

Q. Where did you first see the defendant?

A. I saw the defendant at his place of business, 526½ South Hill Street, on the evening of August 29, 1949.

Q. Who was with you at that time?

A. Agent George Schnelbach and Agent Howard Swinney and Police Detective Clifton Wright, with the Pasadena Police Department.

Q. Did you have any conversation with the defendant, or did anyone have a conversation with him in the presence of you?

(Testimony of Victor D. Carli.)

A. Yes, I had a conversation with him in the presence of other agents. [58]

Q. What did he say and what did you say?

A. I questioned him at the time at 546½ South Hill Street and showed him a photograph of John Wyatt and asked him if that was a photograph of John Wyatt and asked him if he ever saw this person before.

He said, no, he never saw him before in his life; he didn't know him.

Q. Did you advise the defendant at that time he did not need to answer your questions unless he desired, and the answers must be voluntary?

A. I advised him at the time we were federal officers and we were making an investigation pertaining to the counterfeit notes, and he was one of the persons involved, and if he wanted to tell us the truth in the matter he could, and if he didn't, he didn't have to tell us anything.

Q. Proceed with the conversation.

A. I showed him a photograph of John Wyatt, Eleanor Shaw, and Marie Taylor. He said he never saw any of them before in his life.

I asked him if he ever had been at 7219 Whitsett Avenue in Los Angeles. He denied it.

I asked if he had ever been at the Top Rail bar. He said he had never been there in his life.

We asked him if he had a Chrysler automobile and he said yes. He took us to the location where the car was, and we [59] searched his car and nothing was found.

(Testimony of Victor D. Carli.)

Then he drove us to his home, I think it was 333½ West 66th—West 68th Street, Los Angeles. Or was it East 68th Street? Possibly East 68th. He gave us consent to search his place. In fact, he said he just moved in that day or the day before and he just moved from another location.

Q. Did you have any conversation with the defendant at that time concerning the Didier restaurant in Whittier? A. Not at that time, no.

Q. You searched his domicile at that time?

A. Yes.

Q. You found no counterfeit money?

A. No counterfeit money was found.

Q. When did you next talk to the defendant?

A. The following day.

Q. Where?

A. At our office in Los Angeles.

Q. Who was present at that time?

A. There were Agents George Schnelbach, who was there, and Agent Howard Swinney and Agent Harold Polenz was there part of the time.

Q. What was said by the defendant to you and what did you say to the defendant? What was said by the defendant in your presence?

A. At that time we confronted him with John Wyatt. [60]

Q. John Wyatt was there at that time, too?

A. That is right.

Q. What was the conversation?

A. We asked John Wyatt if he knew this man before, and he said yes.

(Testimony of Victor D. Carli.)

And asked John Wyatt to relate under what circumstances he knew him. He stated he was the man that delivered the 150 counterfeit ten-dollar notes to him on Friday morning, August 26th. He denied ever seeing John Wyatt before in his life, the defendant did.

He said he didn't know him, never saw him before in his life. After some more questioning he finally admitted he knew the defendant John Wyatt but that he did not deliver counterfeit notes to him. He had been to his home there. He was brought by another person by the name of Joe.

We asked who Joe was, and he stated he didn't know. He said he knew him by the name of Joe. He knew him by the name of Phil. He thought the name was something like Bellenti or Ballenti. He didn't know his last name. He said that Joe was in his employ at various times for several weeks, and he had been to his home, but he didn't know who he was, that is, his last name. He described him to us.

Q. Any further conversation?

A. Not that I recall on that date. There was other conversation—— [61]

Q. Do you recall asking him anything about Eleanor Shaw or Marie Taylor? A. Yes.

Q. At that time?

A. Yes. We showed him a photograph of Eleanor Shaw and Marie Taylor at that time. He admitted he knew them, he met them at the house at 7219 Whitsett Avenue in Los Angeles.

(Testimony of Victor D. Carli.)

Q. Did he say when?

A. He said he was taken there by Joe, that introduced him to them, a person named Joe.

Q. Did he say when that occurred with respect to August 26th?

A. Within a few, two or three days before he was arrested by us.

Q. Do you know where Eleanor Shaw and Marie Taylor are now? A. No, I don't.

Q. Have you had any other further conversation with the defendant that you recall since that date?

A. Yes, Agent Schnelbach and I talked to him at the Los Angeles County Jail a few days——

Q. When was that?

A. I don't remember the exact date. I think about four or five days after his arrest.

Q. Who was present? [62]

A. Agent George Schnelbach and myself, and the defendant.

Q. What did you say and what did the defendant say?

A. I questioned him relative to having gone to Johnny Didier's restaurant, Johnny's Cafe, at Whittier Boulevard.

He said he had never been there before.

I said, "Wait a while. We know people that can identify you." They had identified his photograph.

Q. He said he had never been there in his life?

A. Yes.

Q. Proceed.

A. I told him people identified his photograph.

(Testimony of Victor D. Carli.)

He said, "Yes, I was out there. I was out there with Joe."

We said, "Who else?"

He finally said he was out there with Eleanor Shaw and Marie Taylor.

Q. Did he say when he was out there?

A. On the night—he didn't say the exact night. He said it was in a few days before we arrested, a night of the preceding week, before we arrested him.

Q. Did he express any reason for being there?

A. No reason at all, only that Joe told him to go out there with him.

Mr. Steele: At this time, your Honor, I wish to offer in evidence Government's Exhibits 1-A, 1-B, 1-C, and 1-D. [63]

The Government: They may be received.

The Clerk: Government's Exhibits 1-A, 1-B, 1-C, and 1-D received in evidence.

(The documents referred to, previously marked Government's Exhibits Nos. 1-A, 1-B, 1-C, and 1-D, respectively, were received in evidence.)

Mr. Steele: You may cross-examine.

Cross-Examination

By Mr. Larsen:

Q. Mr. Carli, when you arrested the defendant, did you tell him what he was suspected of?

A. I told him right away, it was relative to the counterfeit notes.

(Testimony of Victor D. Carli.)

Q. What did he say?

A. He said he didn't know anything about them.

Q. Did you tell him that you had others under arrest?

A. Yes, sir.

Q. For the same thing?

A. Yes, sir, I did.

Q. Did you tell him that you had Mr. and Mrs. Wyatt under arrest for having counterfeit notes?

A. No, I didn't tell him we had Mr. and Mrs. Wyatt under arrest for having counterfeit notes.

Q. How long after Mrs. Wyatt was arrested was it before the defendant Schiros was arrested?

A. Mrs. Wyatt was arrested on Friday evening, August [64] 26th, and Carl Schiros was arrested on the evening of August 29th, Monday night.

Q. I see. After he was arrested did you tell him that you had Mr. and Mrs. Wyatt under arrest or locked up?

A. Not right away. We told him that, I believe, the following day.

Q. Did you ask him anything about Mr. and Mrs. Wyatt before you told him that they were under arrest?

A. I just showed him the picture of John Wyatt and asked him if he knew him. He said he never saw him before in his life.

Q. Where were you when you showed him that picture of John Wyatt?

A. In a government automobile.

Q. In a government automobile?

(Testimony of Victor D. Carli.)

A. That is right.

Q. What time of day or night was it?

A. It was about 6:00 o'clock in the evening, August 29th; it was daylight.

Q. Was it a picture of both Mr. and Mrs. Wyatt?

A. No. It was a picture of John Wyatt. I showed him a picture of Mrs. Wyatt the next day, not that day.

Q. That automobile you were in was a sedan?

A. Yes.

Q. When was it that you confronted the defendant with [65] Mr. Wyatt?

A. It seems to me, if my memory serves me right, it was the following day.

Q. Where were you at that time?

A. In our room upstairs, in Room 754.

Q. When the defendant was confronted with Mr. Wyatt, what did he say?

A. He said he never saw him before in his life.

Q. How long did he continue to deny the acquaintance?

A. For about 15 or 20 minutes.

Q. At the end of that time, what did he say?

A. Then he admitted knowing him, but he said, "I never sold him any counterfeit notes like he said I did. I was over to his house. I knew his sister. I was brought there by Joe. I knew his sister, Eleanor Shaw. I met him at his house on Whitsett Boulevard."

(Testimony of Victor D. Carli.)

Q. Did you know who this Eleanor Shaw was?

A. I did then, yes.

Q. She was related to Mr. Wyatt?

A. She is Wyatt's sister. That is from what John Wyatt tells me.

Q. Did you know at that time of an individual by the name of Joe?

A. Only what I have heard through other sources and through what the defendant has told me. [66]

Q. Had you known this Joe previously?

A. No, I didn't know about Joe previously.

Q. Did you find out anything about Joe from Mr. Wyatt?

A. They said they never knew Joe. They questioned him on it.

Q. Did you question him about a Phil Ballenti or Phil Vallenti?

A. Question the defendant?

Q. No. Mr. Wyatt. A. Yes.

Q. What did he say?

A. He didn't know him

Q. You say you searched the defendant's home?

A. Yes, sir.

Q. You found no spurious money there at all?

A. No, none was found.

Q. Did you search his place of business?

A. I didn't search it. Some of the other agents searched his place of business.

Q. Where was the place of business?

A. 526½ South Hill Street.

(Testimony of Victor D. Carli.)

Q. What kind of business is that?

A. Known as Carl's Frosty Place. He sells ice cream and such as that.

Q. Directing your attention to one portion of the [67] Government's first exhibit in evidence, which appears to be a representation of a ten-dollar bill, will you explain to the jury wherein that differs from a regularly minted government ten-dollar bill?

A. Where it varies?

Q. Yes.

A. In the first place the serial number on this bill doesn't vary. It looks like a genuine bill. That is the reason it is counterfeit. It is a very good production of a counterfeit.

Q. Taking that bill alone, were you not to see it with the other 149, and disregarding the serial number——

The Court: Give any unusual things that show.

The Witness: There is nothing unusual about the bill to the average person, only that the portrait, the eyes are not clear. The lathe work is not very clear. The average person would take that as a genuine note.

The Court: In the language of the movies, it is a good facsimile thereof ?

The Witness: It is a very good facsimile. There is a very good note.

Q. (By Mr. Larsen): Is there anything about the printing of the bill that differs from the regulation ten-dollar bill?

(Testimony of Victor D. Carli.)

A. Well, to my eyes, knowing counterfeit bills, having a lot of experience with them, I see the hair is a little [68] grayer. It should be darker—whiter than it is, than being gray as it is. The printing is not clear. The seal is a little different in the color green as the genuine bills have. The back of the note is not as clear as a genuine note. So far as the note itself is concerned, it is a very good counterfeit.

Q. What about the letters?

A. The serial numbers?

Q. No. The lettering, for example, in "United States of America," is there anything about that which would differ from the regulation ten-dollar bill? A. None that I notice.

Q. Is there anything about the color of ink on the back side of the bill which would designate it to be counterfeit?

A. No, there is nothing on there that would designate it to be counterfeit.

Q. Is there anything about the color of the ink on the green side of the bill that would show it to be counterfeit?

A. Nothing on there, only, like I say, the bill itself is not clearly printed, as it should be.

Q. In other words, you could clearly distinguish that bill from the good bill which I have handed you? A. That is correct.

Q. By the picture, chiefly, is that correct? [69]

A. That is right, by the picture and the back

(Testimony of Victor D. Carli.)

of the note, also, see how clear and distinct it is.

Q. All right, sir. Is there anything regarding the large capital letter at the left-hand side of the picture on the bill, which would indicate it to be spurious?

A. No. That would not designate it as a counterfeit.

Q. Those letters vary from issue to issue?

A. It all depends on what Federal Reserve district that issues the bill. San Francisco is your Twelfth Federal Reserve District, and the letter in the left-hand corner would be L, for the reason that L is the twelfth letter in the alphabet.

Q. You say there is a substantial difference in the paper texture?

A. That is correct. It is not the genuine paper. Our government paper has silk fibers. This bill does not.

Q. This bill does not? A. No.

Mr. Larsen: That is all.

The Court: Is there any redirect examination?

Mr. Steele: No.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Steele: Mr. Schnelbach, please. [70]

GEORGE SCHNELBACH

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: George Schnelbach.

Direct Examination

By Mr. Steele:

Q. What is your occupation?

A. Agent, U. S. Secret Service.

Q. How long have you been so employed?

A. I have been in the Secret Service 12 years.
I have been an agent for seven years.

Q. You were so employed on August 26th of this year? A. Yes.

Mr. Steele: Will you stand up, Mr. Wyatt, please?

(Mr. Wyatt complies.)

Q. (By Mr. Steele): Have you seen Mr. Wyatt before? A. Yes, I have.

Q. Have you seen the defendant before?

A. Yes.

Q. Where did you first see the defendant?

A. I first saw the defendant at his place of employment, or his Carl's Frosty, which he operated at 5261½ South Hill, Los Angeles.

Q. He was the proprietor of that establishment?

A. That is right.

Q. Who was present on that occasion?

(Testimony of George Schnelbach.)

A. Agent Victor Carli and Agent Howard Swinney.

Q. When was that?

A. That was on August 29, 1949, about 6:00 o'clock in the evening.

Q. Directing your attention to Government's Exhibit 1 in evidence, I want you to examine that, if you will, please, the contents of those envelopes. Have you seen those before?

A. Yes, I have.

Q. Where did you first see those objects?

A. Well, I first saw the 17 of them at Pasadena, which were confiscated from Bonnie Wyatt.

Q. Who had them in their possession at that time?

A. Detective Clifton Wright of the Pasadena Police Department.

Q. Will you explain to the jury where you first saw the others?

A. The other 56 were taken out of the automobile which belonged to Chester Morris, on the evening of August 26, 1949.

Q. At Pasadena? A. At Pasadena.

Q. You have heard the testimony of Mr. Carli, who testified, I believe, that the car was broken in; is that substantially what happened? [72]

A. That is right.

Q. That is where you found these bills?

A. Yes.

Q. Have you had occasion to examine the bills closely since that time?

(Testimony of George Schnelbach.)

A. Yes, I have, and my initials are on the bills.

Q. As a member of the Secret Service you have undergone a course of training in detecting counterfeit and spurious coin? A. Yes.

Q. You have examined the bills? A. Yes.

Q. As a result of your examination, was your opinion—— A. They are all counterfeit.

Q. What leads you to that conclusion?

A. An over-all comparison of a genuine note is the best way to determine a counterfeit note. These aren't printed on genuine paper. They all bear the same serial number, which, naturally, a genuine bill has different serial numbers. The general workmanship of the note is poor.

Q. Getting back to the first time you saw the defendant——

The Court: Let us bring the bills to their present container. I do not think you had the other witness testify to that. Let us have this witness testify to that.

Q. (By Mr. Steele): The bills were given over to your [73] custody at that time in Pasadena?

A. Yes, they were.

Q. Your custody and Mr. Carli's, or your own?

A. Mr. Carli and Mr. Wasson's, the agent in charge.

Q. You all three were from the office?

A. That is right.

Q. What did you do with the bills after you left Pasadena?

(Testimony of George Schnelbach.)

A. They were taken to our office and kept in our safe.

Q. By you? A. That is right.

Q. That is, the three of you? A. Yes.

Q. And kept in your safe for how long?

A. Until they were turned over to the United States Attorney's office.

Q. What time was that?

A. That I can't tell you, unless I would look at the report that was written to you.

Q. Can you fix the time by some event?

The Court: Can you tell by the containers? Is there any indication on the envelopes?

The Witness: No, I couldn't tell from these, your Honor.

The Court: Did you place them in those envelopes? [74]

The Witness: Yes.

The Court: Those envelopes were turned over to the United States Attorney's office?

The Witness: That is right. These notes all bear our initials for identification purposes.

The Court: All of those?

The Witness: Yes.

The Court: They are, so far as you can tell, in the same condition, in the same containers they were when they left your possession and were turned over to the United States Attorney?

The Witness: Yes.

The Court: Each of the bills, in addition to that, has an identifying mark of all three of you?

(Testimony of George Schnelbach.)

The Witness: Yes.

The Court: They bear your own initials?

The Witness: Yes.

The Court: I think that is sufficient. I merely wanted to bring that up at the present time, rather than having it suspended in the air.

Mr. Steele: Thank you, your Honor.

Q. (By Mr. Steele): Directing your attention to the first time you saw the defendant, I believe you stated that was at his place of business on a certain day at a certain time. Did you have any conversation or did anyone with you [75] have any conversation with the defendant at that time?

A. I was accompanied by Agent Carli and Agent Swinney at that time, and the defendant was informed we were investigating a matter pertaining to the passing of counterfeit notes. He was questioned and, as Mr. Carli stated, he was taken to his car and we searched his car.

We found no contraband of any kind.

He then took us to his home in his own car and we searched his home with his permission and found no evidence of any contraband there.

Do you want me to continue on?

The Court: Go ahead.

The Witness: Later that evening we took Carl Schiros to the office and questioned him further, and that same night, about 11:00 o'clock, approximately 11:00 p.m., John Wyatt came to the office at our request. He identified Carl Schiros as the

(Testimony of George Schnelbach.)

person who delivered \$1500.00 in counterfeit notes to him on the morning of August 26, 1949.

The next day Carl Schiros was again questioned at our office and confronted with John Wyatt, at which time John Wyatt positively again identified Carl Schiros as the person who delivered these counterfeit notes to him.

Q. (By Mr. Steele): At that time did the defendant deny——

The Court: Do not ask him a leading question. Ask him [76] what he said. What did Schiros say?

Q. (By Mr. Steele): What did the defendant say at that time?

A. The defendant denied he had delivered any counterfeit notes to the—to John Wyatt.

Q. Anything else?

A. Well, he admitted he had been to his home on one occasion, and met his wife. This was after we had questioned him for a while. At first he denied everything, on the night of August 29th he denied everything.

The Court: What do you mean by “everything”?

The Witness: He denied that he knew John Wyatt, or denied he had ever seen him before, or that he had ever been to his home.

Q. (By Mr. Steele): Did you have any further conversation with the defendant after that?

A. There were several times that I talked to the defendant after that, with Agent Carli, and

(Testimony of George Schnelbach.)

while he was confined in the Los Angeles County Jail and while he was released on bond.

Q. Was there ever anyone present, other than yourself and Agent Carli and the defendant, on those occasions?

A. I may have been alone when I talked to him sometimes.

Q. Do you recall anything that was said by you to the defendant or by the defendant to you on those occasions? [77]

A. Nothing in particular that would reflect any further on the delivery of the notes.

Mr. Steele: That is all. You may cross-examine.

Cross-Examination

By Mr. Larsen:

Q. The defendant denied at all times he had anything to do with the notes, didn't he?

A. Yes, he did.

Mr. Larsen: That is all.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Steele: Mr. Morris.

CHESTER MORRIS

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Chester Morris.

(Testimony of Chester Morris.)

Direct Examination

By Mr. Steele:

Q. Mr. Morris, what is your occupation?

A. Bartender.

Q. Where are you employed?

A. Johnny Didier's Cafe.

Q. In Whittier? [78] A. Whittier.

Q. Were you employed there on August 26th of this year? A. Yes, sir.

Q. Have you seen the defendant before?

A. Yes, sir.

Q. When did you first see the defendant?

A. August 26th, around 6:30, 7:00 o'clock in the evening.

Q. Where? A. Johnny Didier's Cafe.

Q. Did you notice whether he was accompanied by anybody there?

A. He was accompanied by two women.

Q. Did you observe him come into the place?

A. No, I didn't.

Q. Was he there when you went on duty?

A. No, sir.

Q. You know the persons who were with him?

A. Yes.

Q. Who were they?

A. Marie Taylor and Eleanor Shaw.

Q. Did you have any conversation with the defendant? A. No conversation at all.

Q. You were not introduced to him?

A. No. [79]

The Court: Did you wait on him?

(Testimony of Chester Morris.)

The Witness: I drew his beer for him.

The Court: Did you serve him any drinks?

The Witness: I drew his beer for him.

The Court: You drew his beer for him?

The Witness: Yes.

The Court: You mean he gave an order, did he not?

The Witness: He gave the order to the waitress——

The Court: I see.

The Witness: ——and she told me.

The Court: I thought perhaps you were serving him direct. Go ahead.

Q. (By Mr. Steele): Did you observe the defendant leave the restaurant? A. Yes.

Q. Did he leave alone or was with someone?

A. All three, Marie Taylor and Eleanor Shaw and the gentleman known as Jimmie.

Q. You have a car, have you?

A. Did have.

Q. Where is your car, if you know, now?

A. U. S. Customs Bureau has it in custody.

Q. Did you have your car on that day? That is, did you have it with you?

A. Yes, up to the time that they borrowed it.

Q. Who borrowed the car?

A. Johnny Wyatt and Bonnie Wyatt.

Q. When did they borrow it that day?

A. It must have been around noon or something like that.

(Testimony of Chester Morris.)

Q. Without telling me what they said, did they tell you why they borrowed it?

A. They wanted the car——

Mr. Larsen: Just a minute. That is hearsay.

Q. (By Mr. Steele): Without stating what they said.

Mr. Larsen: Stating why would be hearsay, if the Court please.

The Court: I think the purpose is material. Furthermore, I think we should be fair to this witness, in protecting any rights he may have. I have in mind a couple of opinions of my own I have written on that subject, relating to any knowledge he may have had.

Mr. Larsen: Very well. I withdraw the objection.

The Court: All right. Go ahead.

Q. (By Mr. Steele): Did he state why he wanted the car?

A. Wanted to borrow the car to go shopping.

The Court: I want to ask a question. The officers may not like it, but I am doing it on purpose.

Did you know at any time that that was to be used for the purpose of transporting any illegal money or taking them [81] about to cash any money?

The Witness: No.

The Court: All right. I did that on purpose. You can tell your lawyer I asked that question. If he knows as much as I think he ought to, he

(Testimony of Chester Morris.)

will tell you it will help you in some future matter relating to the automobile.

Q. (By Mr. Steele): Were you shown any ten-dollar bill or any ten-dollar bills at any time by Mr. Wyatt?

A. No, I wasn't shown any money by Mr. Wyatt except when he busted a ten to have a bottle of beer.

Q. Where was that?

A. In Johnny's Cafe.

Q. Was that on that day? A. Yes.

Q. About what time of the day was it?

A. Well, must have been around 6:30, 7:00 o'clock; when I was on duty.

Q. It was in the morning?

A. No, in the evening.

Q. You said that was Wyatt that purchased some beer that night? A. That evening, yes.

Q. 6:30 or 7:00, you think?

A. I don't know. It was dark outside.

Q. Let me ask you this question: Was it at a time [82] when the defendant was in the cafe?

A. No, sir.

Q. Was it before or after the defendant had been there that Wyatt broke this ten-dollar bill, if you remember? A. I believe it was after.

Mr. Steele: You may cross-examine.

Cross-Examination

By Mr. Larsen:

Q. What were you working, what hours, on the 26th?

(Testimony of Chester Morris.)

A. 4:00 in the afternoon to 2:00 in the morning.

Q. Do you know how long after you came to work it was that Mr. Wyatt came in?

A. It must have been at least three hours or more.

Q. In other words, it might have been around 7:00 o'clock? A. I never looked at the clock.

Q. Do you know, of your own knowledge, whether he came in before or after Mr. Schiros?

A. He came in after Mr. Schiros was there.

Q. How long after?

A. Well, half an hour or an hour that I recognized him there.

Q. Now, this lady who previously testified, Mrs. Morris, is your wife? A. Yes, sir. [83]

Q. She was working out there that evening?

A. Yes, sir.

Q. The proprietor of the cafe is no relative, is he? A. No, sir.

Q. Now, is Mr. Wyatt related to you in any way?

A. I guess he is a brother-in-law. We married sisters.

Q. His wife, Mrs. Wyatt, would be related to you? A. Yes.

Q. Mrs. Shope is related to you? A. Yes.

Q. What about Eleanor Shaw, is she related?

A. No relation.

Q. Did you know her? A. Yes, sir.

Q. How long have you known her?

A. About since 1943.

(Testimony of Chester Morris.)

Q. Did she room or live with any of your relatives?

A. No—she stayed with Wyatt, Johnny Wyatt, my brother-in-law, for awhile.

Q. She stayed with your brother-in-law and his wife?

The Court: Do not repeat the answers, Mr. Larsen.

Mr. Larsen: I am sorry, your Honor.

The Court: Everyone does it, though.

Mr. Larsen: It is a bad habit. I have done it for 25 years. [84]

The Court: As you grow older you will have to drop it.

Mr. Larsen: I must.

Q. (By Mr. Larsen): What about Marie Taylor, is she related to you? A. No, sir.

Q. Did she live with either or any of your relatives? A. No, she lived alone, I guess.

Q. She never lived with Mr. Wyatt or Mrs. Wyatt?

A. No, not lived. She might have stayed a night or two.

Mr. Larsen: That is all.

The Court: Step down, Mr. Morris.

(Witness excused.)

Mr. Steele: The Government rests at this time.

Mr. Larsen: Take the stand, Mr. Schiros, please.

CARL JOSEPH SCHIROS

the defendant, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: My name is Carl Schiros.

The Clerk: Do you have a middle name?

The Witness: J.

The Clerk: Does that stand for anything?

The Witness: Joseph.

Direct Examination

By Mr. Larsen: [85]

Q. Where were you living prior to your arrest, Mr. Schiros?

A. I was living at 333½ East 68th Street.

Q. What was your business or occupation at the time of your arrest?

A. I was in the ice cream business.

Q. Directing your attention to Mr. John Wyatt, who has previously testified, do you know him?

A. Well, I met him one time.

Q. When and where did you meet him?

A. I met him in front of his home.

Q. Where was that?

A. Well, I don't recall the street now. I met him, I was introduced to him.

Q. By whom were you introduced to him?

A. I was introduced to him by a Joe Ballenti.

Q. At that time were you introduced to any other person or persons?

(Testimony of Carl Joseph Schiros.)

A. Well, not at that time. That was the second time I was there. The first time that I was there, that I went there with this Joe—you see, this Joe, I met him about eight months ago. He used to hang around the place of business. He used to work a little bit for me.

Well, it so happened at the time he wanted to meet a girl that he hadn't seen for some time, so he asks me if I [86] would drive him down there. Well, either that, or else take my car. So I says, "I will drive you down there." So I drove him down there, and I don't remember the street, but, anyhow, we came to a house and he went inside and he asked me to come in.

So after I went in, I met this girl named Eleanor, a big, fat girl, and another girl that was introduced as—later on found out it was this fellow Johnny Wyatt's wife, and a couple of other kids around there that I didn't know at the time, who they belonged to.

I didn't know the people and I just sat there and didn't have much to say. So then we was there for a little while and this fellow with me, he talked to one of the girls. They went to the kitchen and they talked for a little while, and then they came back and he asked me if I was ready to go, so we left.

I think it was a couple of days later that he wanted to go back down there and told me that—I says, "Look," I says, "no use of me going down there."

(Testimony of Carl Joseph Schiros.)

He says, "Well, let's go down there and take a ride. You ain't doing nothing."

We went down there. This time I didn't go in. I stayed outside in the car and I waited for him. He just went in there and stayed about five minutes, and after he came out this fellow, Johnny Wyatt, he came out, and he was standing [87] by the walk. He says, "This is Jimmie."

Well, where the name Jimmie came from, from the start I meant to say, was that this fellow Joe, when he introduced me, he says, "I want you to meet Jimmie."

Later on, after we went out, I asked him, I says, "What is this Jimmie deal?" I says, "What is the idea of telling them I am Jimmie?"

He says, "You know, after all, you don't want to tell these girls your right name." He says, "You know, you are a married man. Never tell them your right name." I just let it go at that.

So I think it was—might have been the following week, and he says to me, did I want to take a ride with him to a bar to meet the girls? I never did meet this here Marie, supposed to be a girl friend of this other girl.

He says, "I want you to meet her."

So I says, "Well," I says, "I don't know." I says, "You know, I don't know the girl."

He says, "Well, come down there, anyway." So we drove out there.

We kept going out, and when he said Whittier,

(Testimony of Carl Joseph Schiros.)

I knew a street Whittier but I didn't know it was a town. So, anyhow, we went out there, and it must have been about, I would say, around 7:00, 7:30, around there.

So after we went in there he introduced me to this Marie. [88] That was the first time I met her. So we sat down and we had a couple of beers and we were there about 15, 20 minutes, when this fellow walks out with both of the girls. He went out and stayed about 15 minutes and came back. Then we stayed there about, I would say, another 20, 25 minutes, and then we left.

Q. All of you left, all four?

A. No, just me and this fellow.

Q. I see.

A. We left, because I was there with my car. They probably left, because they said they were going to leave right after us. We left first.

We went, and I went outside. We went down—well, I left him home, because I wanted to go home. I left him on Figueroa, Figueroa and Manchester. He wanted to get off there, so I left him off there.

Q. Do you remember what date that was?

A. At the time I was at the bar? A. Yes.

Q. Yes.

A. I believe it was on a Saturday.

Q. How long or how many days after that was it when you were arrested?

A. Well, it wasn't very long after that. I would say maybe a week.

(Testimony of Carl Joseph Schiros.)

Q. Now, previous to the time of your arrest, how many [89] times had you seen Mr. Wyatt?

A. Before I was arrested?

Q. Yes. A. One time.

Q. Had you been introduced to him at that time? A. Yes, sir.

Q. Did you ever on any occasion see Mr. Wyatt in a cocktail bar or a saloon called the Top Rail Cafe or Top Rail Bar?

A. No, sir. I don't even know where it is at.

Q. To the best of your recollection have you ever been in the Top Rail bar? A. Never.

Q. Did you ever at any time give to Mr. Wyatt all or any of the ten-dollar notes which are in evidence? A. No, sir.

Q. When was the first time you saw any of them?

A. Well, the last time when I was at the Federal Building and one of the agents showed me. That was the only time I seen them, and now here.

Q. Had you ever seen them before that time?

A. No, sir.

Q. Did you ever give those bills, or any other money that you knew to be counterfeit, to any person to pass? A. No, sir. [90]

Q. Or keep such bills with the intention of defrauding any person or persons? A. No, sir.

Q. Now, you have heard Officer Carli testify you were shown a picture of Mr. Wyatt, and that you said you did not know the subject of the picture, is that true?

(Testimony of Carl Joseph Schiros.)

A. At the time I didn't. He showed me a picture. I met the man only once before that. He showed me the picture in a car, and I couldn't recognize the picture. That same night when he faced me with Johnny Wyatt, I recognized him right away. I says, "I was over to his house one time."

He says, "You said you didn't recognize him."

I said, "Well, I couldn't recognize the picture." I said, "Now I am faced with him," I said, "yes, I seen him once at his house. I was introduced to him."

Q. He further states, I believe, that he confronted you with the names of Marie and Eleanor and you said you didn't know who they were.

A. He showed me one picture, I believe it was. It could have been this Marie. But I only seen this Marie, like I say, I only seen her one time, and I couldn't recognize her at the time.

Q. How many times were you confronted with Mr. Wyatt after your arrest, if you remember?

A. Well, I confronted him at the Post Office, in the [91] office, one of the agents' office.

Q. Now, were you there when he stated to the officers that you were the person who gave him these bills on the morning of the 26th? Did you hear him say that?

A. You mean the first time?

Q. No. I mean, you heard the testimony of the last officer on the witness stand, did you not?

(Testimony of Carl Joseph Schiros.)

A. Yes, I did.

Q. Where he said that Mr. Wyatt stated, in your presence, that you were the man who gave him the bills. Did you hear him say that or words to that effect? A. I said, "That is the man."

Q. All right. But you had only seen him the one time? A. Yes, sir.

Q. What time of day or night was it you had seen him?

A. It was in the day time. It was about 4:30, 5:00 o'clock.

Q. How long were you in his presence at that time?

A. I was sitting in the car, waiting for this fellow to come out. And he came out with him and he was standing about ten feet away from me, and he just said, "This is Jim."

"Hi," and so forth. And he got in the car and we left.

Q. Incidentally, how long had you known this person that we have been terming "Joe"?

A. Well, about, at the time it would be about six months. [92]

Q. Did you also know him by any other name?

A. Yes. At first, when I first met him, he used to hang around this here place of business. He used to play cards there in the parking lot. My place is—well, it is right on the parking lot there.

He used to go in the back there, and some of the boys used to get together and play cards. Well,

(Testimony of Carl Joseph Schiros.)

I got acquainted with him through that. Well, at the time he told me his name was Phil. But later on——

The Court: I cannot see the relevancy of all this matter. It is sufficient that he tells us when he met him, and not all the details as to the conversation.

Mr. Larsen: Perhaps I can bring it to a head, your Honor, in this way:

Q. (By Mr. Larsen): How long after you became acquainted with him was it before you knew him by some other name?

A. A couple of months. Then he told me his name was Joe. After he was helping me around over there, he gave me his last name, and he gave me his last name as Ballenti.

Q. Did you ever have any transaction with him relating to any counterfeit money?

A. No, sir.

Q. Or with any other person? A. No, sir.

Mr. Larsen: Cross-examine. [93]

Cross-Examination

By Mr. Steele:

Q. You stated you knew Joe Ballenti or someone who called himself Joe Ballenti for about six months before this, before your arrest, is that correct? A. That is right.

Q. Did you ever take any trips with Joe Ballenti, any automobile trips? A. No, I haven't.

Q. You stated, I believe, that when you were

(Testimony of Carl Joseph Schiros.)

confronted with a picture of Wyatt you did not recognize him from the picture, is that right?

A. That is right.

Q. And that you were shown this picture in a car.

A. That is right.

Q. It was at night, was it? A. It was.

Q. Was it dark out at the time?

A. That is right.

Q. Afterward, when Wyatt was brought into the room, you were face to face and you immediately recognized him, is that correct? A. Yes, sir.

Q. You told him so at the time of the meeting, is that right? [94] A. That is right.

Q. Now, directing your attention to the evening you went to this restaurant and bar out on Whittier Boulevard, before you went out there this Joe Ballenti told you he was taking off to meet somebody, is that right? A. Yes.

Q. One of the girls? A. Yes.

Q. What was her name, again, Eleanor?

A. That is the girl that he was keeping company with.

Q. He wanted you to meet her?

A. No; her girl friend.

Q. He wanted you to meet Marie?

A. Yes.

Q. The heavy one?

A. They are both heavy.

Q. Was Marie employed there or do you know?

(Testimony of Carl Joseph Schiros.)

A. No, I don't.

Q. She wasn't acting as a waitress when you went there, was she? A. No, she wasn't.

Q. They were just sitting at a table when you came in? A. Yes.

Q. Were they eating anything or just drinking beer?

A. They were just sitting at a table with——

Q. This was toward the end of the day, was it, around 6:00 or 7:00?

A. Somewheres in there.

Q. Where were you when Joe picked you up that afternoon to go out there?

A. I was over at my place of business.

Q. About what time was that?

A. I would say' around—well, I would say around 5:00 o'clock. He was there before that. He hangs around there, you know. I mean, the time we left from there was 5:00 or 5:30.

Q. He suggested to you, "Let's go out to this place, that I know, out on Whittier Boulevard, and I want to introduce you to a girl," or something like that, is that it?

A. No. I will tell you what it was. You see, he was keeping company with this one girl——

Q. With Eleanor?

A. With this Eleanor. And he wanted me to meet her girl friend. So he asked me, and—well, I never wanted to bring that up on account of being a married man, you know.

(Testimony of Carl Joseph Schiros.)

Q. Yes.

A. So I says—so, I went with him, anyway, just for the ride.

I said, “I will go.” He was telling me she was a nice girl to know. [96]

Q. You took him out in your car, didn’t you?

A. That is right.

Q. You departed immediately after you made up your mind to go along?

A. We left, it was around 5:30.

Q. You got there around 6:30?

A. That is right.

Q. You never went out there after that time?

A. Never.

The Court: You say that on this occasion Mrs. Wyatt was not there?

The Witness: Mrs. Wyatt?

The Court: Yes.

The Witness: I didn’t see her.

The Court: You never met her?

The Witness: I met her, yes. I met her at her home.

Q. (By Mr. Steele): On the day you met Mrs. Wyatt at her home, you didn’t meet Mr. Wyatt on that day?

A. Not the first time, not when I met his wife.

Q. Just Mrs. Wyatt the first time, and he wasn’t there?

A. Mrs. Wyatt and this Eleanor and a couple of other kids around there, that I didn’t know.

(Testimony of Carl Joseph Schiros.)

They looked big to me. They said they were their kids, but they looked pretty big to me.

Q. Now, on both the other occasions when you were out [97] there to the Wyatts', the first time you met Mrs. Wyatt and the second time when you met Mr. Wyatt, you were driving your own car, weren't you? A. I was.

Q. This Joe didn't have a car?

A. He didn't.

Q. Mr. Schiros, have you ever been convicted of a felony?

A. Well, I don't know whether it would be a felony or not. I was convicted for gas coupons, but I don't know if that was a felony or not.

Mr. Steele: Maybe we had better approach the bench, your Honor.

The Court: All right.

(The following proceedings were had in the presence but out of hearing of the jury.)

Mr. Steele: I have a feeling what the defendant has reference to is this: I believe that is a misdemeanor or——

The Court: What was the amount of the sentence?

Mr. Steele: One year.

The Court: You could not tell from that. It might be a felony or it might be a misdemeanor, depending on the sentence.

I will allow counsel to consult with the defendant, with the view of answering the question.

(Testimony of Carl Joseph Schiros.)

(The following proceedings were had in the hearing and presence of the jury.) [98]

The Court: Repeat the last question.

(The question was read.)

The Witness: Yes, I have.

Q. (By Mr. Steele): That was in 1936, was it?

A. Yes.

Mr. Steele: That is all.

Redirect Examination

By Mr. Larsen:

Q. That was for bootlegging under the Michigan liquor laws, was it not? A. Yes.

Mr. Larsen: That is all.

The Court: Step down.

(Witness excused.)

Mr. Larsen: The defense rests, your Honor.

The Court: Do you have any rebuttal?

Mr. Steele: Just one witness.

VICTOR D. CARLI

recalled as a witness by and on behalf of the Government, in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Steele:

Q. Directing your attention, Mr. Carli, to con-

(Testimony of Victor D. Carli.)

versations you testified to that you had with this defendant and [99] in particular to the occasion on which the defendant was confronted for the first time with Mr. Wyatt—— A. Yes, sir.

Q. ——do you recall that occasion?

A. Yes. That was on the evening of August 29th, the night he was arrested.

Q. Just what occurred? Who was present at that time?

A. Agents George Schnelbach and Howard Swinney, and myself, John Wyatt and the defendant, Carl Schiros.

Q. What was said by the defendant and yourself and John Wyatt and all present at that time, if you can recall the conversation?

A. I brought John Wyatt over and confronted him with the defendant, Carl Schiros. I asked him if he had seen the man before.

Q. You asked the defendant if he had seen the man before?

A. I asked John Wyatt. He said, "Yes."

I said, "Relate the circumstances under which you saw him."

He said, "I saw him the first time at the Top Rail bar," a few days previously, one evening. He said, "I saw him again a day or two later at the Top Rail bar. He came to my house on Friday morning, August 26th." He says, "He delivered to me 150 counterfeit ten-dollar notes in a paper bag which [100] was surrounded in a newspaper, which was wrapped in a newspaper."

(Testimony of Victor D. Carli.)

Q. That is substantially as you testified before. What did the defendant say then?

A. The defendant said, "I never saw that man before in my life."

Q. How long after was it that the defendant admitted knowing John Wyatt, would you say?

A. Oh, about 15, 20 minutes later, after that. Mr. Steele: That is all.

The Court: Was any reference made at that time to his failure to identify him by a photograph the night before?

The Witness: No. He stated that first—I asked him, I said, "Why didn't you tell us the truth before?"

He said, "Well, I didn't think that was necessary."

I said, "Well, you heard what this man says now."

He said, "Well, I didn't meet him that way." He said, "I was taken there by this fellow Joe, at his house."

I said, "Why didn't you tell us that?"

Mr. Steele: One more question, your Honor.

Q. (By Mr. Steele): You did show the defendant a photograph of John Wyatt the first time you saw the defendant?

A. The night he was arrested, on August 29th, at about 6:00 o'clock in the evening, I showed him a picture of John Wyatt. [101]

Q. Where were you when you showed him a picture of John Wyatt at that time?

(Testimony of Victor D. Carli.)

A. In a government automobile.

The Court: It was daylight?

The Witness: 6:00 o'clock in the evening, August 29th, daylight.

The Court: Could you see the photograph with the aid of artificial light?

The Witness: No, it was very light at that time, 6:00 o'clock in the evening.

Mr. Larsen: That was the same night you confronted him with Mr. Wyatt?

The Witness: Yes, later that evening.

Mr. Larsen: That is all.

The Court: Step down.

(Witness excused.)

(The opening argument on behalf of the Government was made by Mr. Steele.)

(The argument on behalf of the defendant was made by Mr. Larsen.)

(The closing argument on behalf of the Government was made by Mr. Steele.)

The Court: Ladies and gentlemen of the jury, the case being completed, the hour is late. It is not our custom to send a case out at this late hour, except under extraordinary [102] circumstances. There are no extraordinary circumstances in this case that would require me to send the case out at the present time.

You will be instructed in the morning. We will adjourn at this time until 9:30 tomorrow morning.

I want to admonish you not to converse among yourselves or with anyone else on any subject connected with the trial, or form or express an opinion thereon, until the cause is finally submitted to you.

You have heard the evidence. You have heard counsel's comments on the case. The case will not be ready for your consideration until you have heard the instructions on the law, which must be given by the judge of this court. We have had some reference in the questioning I directed to you this morning, when you were chosen, and then in statements by counsel, to some of the principles of law which govern criminal cases, the doctrine of reasonable doubt and the like, but not until tomorrow morning will you have a full elaboration of the doctrine.

The case involves two distinct offenses, although they relate to a single transaction. Each of those offenses must be defined to you. You have a conflict to resolve between the testimony of witnesses. I cannot help you solve it, except by giving you criteria by which legally you may resolve contradictions. [103]

You will be instructed on the principles which apply in judging the credibility of the witnesses, including that of the defendant. Until you have those principles of law to govern you, you are not in a position to determine the issue in this case, that is, the guilt or innocence of the defendant, of the charges in the indictment.

We will resume tomorrow morning at 9:30.

(Whereupon, at 5:00 o'clock p.m., Tuesday, November 1, 1949, an adjournment was taken until 9:30 o'clock a.m., Wednesday, November 2, 1949.) [104]

Wednesday, November 2, 1949. 9:30 A.M.

The Clerk: No. 20,908 Criminal, United States of America v. Carl J. Schiros.

The Court: Let the record show the jury is in the box and the defendant is in court with his counsel.

Ladies and gentlemen of the jury, the evidence was concluded yesterday and so were the arguments of counsel. The only thing that remains before the case is submitted to you is for the court to instruct you about the law.

The instructions I am about to give are all written, and I shall read them as written.

If, after you begin your deliberations, you desire to have a copy of the instructions before you, you may have them. You are also entitled to have the exhibits which were introduced in evidence. All you have to do is tell the bailiff you desire them and they will be sent to you.

The law of the United States permits a judge to comment on the facts in the case. Such comments are mere matters of opinion which the jury may disregard if they conflict with their own conclusions upon the facts. This for the reason that the jurors are the sole and exclusive judges of the facts in each case. However, it is not my custom

to exercise this right. Nor shall I exercise it in the present case. I shall leave the determination of the facts in the case to [106] you, satisfied as I am that you are fully capable of determining them without my aid. However, it is my duty, under the law, and my exclusive province, to instruct you as to the law that is applicable to the case, in order that you may render a general verdict upon the facts in the case, as determined by you, and the law as given you by me in these instructions. It would be a violation of your duty to attempt to determine the law or to base a verdict upon any other view of the law than that given you by the court,—a wrong for which the parties would have no remedy, because it is conclusively presumed by the court and all higher tribunals that you have acted in accordance with these instructions as you have been sworn to do.

You are here for the purpose of trying the issues of fact that are presented by the allegations in the indictment and the plea of the defendant thereto. This duty you should perform uninfluenced by pity for the defendant or by passion or prejudice on account of the nature of the charge against him. You are to be governed, therefore, solely by the evidence introduced in this trial and the law as given you by the court. The law will not permit jurors to be governed by mere sentiment, conjecture, sympathy, passion or prejudice, public opinion, or public feeling. Both the public and defendant have a right to demand, and they do so demand and expect,

that you will carefully and dispassionately weigh and consider the [107] evidence and the law of the case and give to each your conscientious judgment; and that you will reach a verdict that will be just to both sides, regardless of what the consequences may be.

The offense with which the defendant is charged is: Keeping in possession and uttering false and counterfeit securities.

In this connection, you are instructed that the indictment on file herein is a mere charge or accusation against the defendant, and is not any evidence of the defendant's guilt, and no juror in this case should permit himself to be, to any extent, influenced against the defendant because or on account of such indictment on file.

It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case. The jury are the sole and exclusive judges of the effect and value of the evidence addressed to them and of the credibility of the witnesses who have testified in the case, and the character of the witnesses as shown by the evidence, should be taken into consideration, for the purpose of determining their credibility and the fact as to whether they have spoken the truth.

And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is [108] presumed to speak

the truth. This presumption, however, may be repelled by the manner in which he testified, his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties, by the character of his testimony, or by evidence affecting his character for truth and honesty, or integrity or by contradictory evidence; and the jury are the exclusive judges of his credibility.

A witness may also be impeached by evidence that he made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

A witness false in one part of his or her testimony is to be distrusted in others; that is to say, the jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue, not as a result of a mistake or inadvertence, but wilfully and with the design to deceive, must treat all of his or her testimony with distrust and suspicion and reject all unless they shall be convinced that notwithstanding the base character of the witness, that he or she has in other particulars sworn to the truth.

A witness may also be impeached by evidence that he has been convicted of a felony or of an offense involving moral turpitude. In this case the defendant has admitted that he has been convicted of a felony. That fact goes only to his [109] credibility, that, is the fact of conviction of another offense may lead you to the conclusion that

his testimony is not to be believed. However, such conviction is not proof of guilt of the offense charged and you may not consider it for that purpose at all. If, notwithstanding such conviction, you believe that the testimony is credible and such testimony raises a reasonable doubt in your mind as to guilt of the offense charged, he is entitled to an acquittal of the charge in this indictment despite the prior conviction.

The law does not require any defendant to prove his innocence, which, in many cases, might be impossible. On the contrary, the law requires the Government to establish his guilt and that by legal evidence and beyond a reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, you should do so, and in that case, find the defendant not guilty.

Reasonable doubt is not a mere possible doubt. Because everything relating to human affairs, and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. [110]

While the defendant in a criminal action is not required to take the stand and testify, yet if he does so, his credibility and the value and effect of his evidence are to be weighed and determined by the same rules as the credibility and effect and

value of the evidence of any other witness is determined. And the tests for determining the credibility of witnesses as given you in another part of the instructions are to be applied to his testimony alike with that of other witnesses.

Mere suspicion, however strong, is not sufficient to establish any fact whatsoever necessary to constitute the crime charged. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderance of evidence supports the allegations of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that the accused is guilty than innocent to warrant a conviction. The accused must be proved to be guilty so clearly that there is no reasonable theory upon which he can be said to be innocent when all the evidence is considered together.

The defendant, Carl J. Schiros, is charged in Count One of the Indictment under the portion of Section 472 of Title 18 of the United States Code, which provides:

“Whoever, with intent to defraud, * * * keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, * * *”

shall be guilty of an offense against the United States.

It is charged in Count One of the Indictment that the defendant, Carl J. Schiros, did on or about August 26, 1949, in Los Angeles County, California,

keep in his possession certain falsely made and counterfeited obligations of the United States, consisting of 150 counterfeited ten-dollar notes of the Federal Reserve Bank of Richmond, Virginia, and did keep said notes with intent to defraud.

It is charged in Count Two of the Indictment that on or about August 26, 1949, in Los Angeles County, California, the defendant, Carl J. Schiros, did pass, utter, publish and sell and did attempt to pass, utter, publish and sell falsely made and counterfeited obligations of the United States, such obligations being 150 counterfeited ten-dollar notes of the Federal Reserve Bank of Richmond, Virginia, with intent to defraud.

There are three essential elements of the offense charged in Count One of the Indictment herein. First, the act of keeping in his possession forged obligations or securities of the United States designated as 150 counterfeit ten-dollar notes of the Federal Reserve Bank of Richmond, Virginia. Second, having such possession with the intent to defraud. Third, having such possession in Los Angeles, [112] California, on or about August 26, 1949.

There are three essential elements of the offense charged in Count Two of the Indictment. First, the act or acts of passing, uttering, publishing, or selling or in attempting to pass, utter, publish, or sell counterfeited obligations and securities of the United States, such being 150 counterfeited ten-dollar notes of the Federal Reserve Bank of Richmond, Virginia. Second, doing this act or these

acts with intent to defraud. Third, doing this act or these acts on or about August 26, 1949, in Los Angeles County.

In a case where two or more persons are engaged in the commission of a crime, the guilt of the accused may be established without proof that the accused did every act constituting the offense.

“Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.”

(and)

“Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.”

Every person who thus wilfully participates in the commission of a crime is held to be guilty of that offense. Participation is wilful if done voluntarily and purposely [113] and with specific intent to violate the law, or with reckless disregard to whether or not the act or failure to act is a violation of law.

To aid means to further the interests or designs of another by assistance or cooperation, to give support, help to another, to assist.

To abet means to encourage, instigate or countenance.

Taken together the words as used in this statute are to be understood, as used in common parlance, according to the dictionary definition I have just given.

The words “to counsel, command, induce or pro-

cure'' are used in the ordinary, everyday sense and need no further definition.

In order to find the defendant, Carl J. Schiros, guilty as charged in either of the counts of the Indictment, the burden is upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged as to that particular count.

In every criminal offense there must be concurrence of act and intent. This is especially true in an offense like the present one which requires that the act shall be done knowingly and wilfully.

This intent is a material element of the offense which, like all others, must be proved beyond a reasonable doubt.

In determining the question, you are to consider all the [114] facts and circumstances in the case which touch the conduct of the defendant, as well as the declarations or admissions, if any.

Criminal intent may be implied from the acts, conduct, declarations or admissions of the defendant. Such acts, conduct, declarations and admissions, as shown by the evidence, considered in relation to the charge made, may establish criminal intent beyond a reasonable doubt.

An accomplice is a person who has knowingly participated in the acts charged as constituting the offense. John and Bonnie Ruth Wyatt are accomplices.

The testimony of an accomplice should be scrutinized carefully by the jury and you should

act upon the testimony of an accomplice with caution and care.

However, it need not be corroborated, and if you believe such testimony, the testimony of an accomplice, even in the absence of any corroboration, is sufficient to sustain a conviction.

Your first duty upon retiring to the jury room to begin your deliberations in the case will be to select one of you to act as foreman in the case.

For your assistance the Clerk has prepared a form of verdict which reads, following the title of court and cause:

“Verdict

“We, the Jury in the above-entitled cause, find the defendant Carl Joseph Schiros (blank) as charged in Count One of the Indictment; and (blank) as charged in Count Two of the Indictment.

“Dated November (blank), 1949.

“(Blank) Foreman of the Jury.”

If you find the defendant, Carl Joseph Schiros, guilty as charged in Count One of the Indictment, you will place the word “guilty” in the blank space opposite that count.

If you find him not guilty, you will place those words in the blank space opposite that count.

If you find him guilty as charged in Count Two of the Indictment, you will place the word “guilty” in the blank space opposite that count of the Indictment.

If you find him not guilty, you will place those words in the blank space opposite that count of the Indictment.

While you are required, unless the court permits you to do otherwise, to return a verdict upon each of the counts of the Indictment, it is not necessary that the verdicts be the same. You have to determine the matters yourself. You have to determine whether you are convinced beyond a reasonable doubt that the defendant is guilty of each of the charges or either of the charges, and you may find one conclusion as to one and another conclusion as to the other.

Remember there are two distinct offenses. Count One charges possession of the counterfeit bills. Count Two [116] charges uttering. The charges are made under the same section of the Code, which section covers a variety of acts, each of which is punishable. So that I repeat again that you may find one verdict as to one count and another verdict as to the other.

The mere fact I am giving you these explanations should not lead you to believe that I have an opinion as to what the verdict should be as to either. All I am telling you is, you are required, unless I discharge you without your arriving at a verdict, to return a verdict as to each count of this indictment.

Whatever your verdict is, it is to be dated and signed by your foreman and returned to this court.

Are there any objections to the instructions given

or refused? If so, opportunity will be given to counsel to present the objections out of the hearing of the jury.

Mr. Larsen: No, your Honor, none on behalf of the defendant.

Mr. Steele: The Government has no objections.

The Court: All right. The instructions remain as given. The Clerk will swear the bailiffs.

(The bailiffs were duly sworn.)

The Court: You will follow the bailiffs and you will begin your deliberations in the case.

I hand the bailiff a blank form of verdict. You may [117] have the exhibits if you will ask for them.

(Whereupon the jury retired to deliberate.)

(At 12:30 o'clock p.m. the jury returned to the courtroom and the following proceedings were had:)

The Court: Call the case.

The Clerk: Case 20,908 Criminal, United States of America v. Carl J. Schiros.

The Court: Let the record show the jury have returned and the defendant is in court with his counsel.

Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: Yes.

The Court: Will you hand the verdict to the bailiff?

(The foreman complies.)

The Court: The Clerk will read the verdict.

The Clerk: (Reading:)

“United States District Court, Southern District
of California, Central Division

No. 20,908 Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL JOSEPH SCHIROS, Charged as Carl J.
Schiros,

Defendant.

VERDICT

“We, the Jury in the above-entitled cause, find the defendant Carl Joseph Schiros guilty as charged in Count One of the Indictment; and guilty as charged in Count Two of the Indictment.

“Dated: November 2, 1949.

“SAMUEL K. MILLER,

“Foreman of the Jury.”

Ladies and gentlemen of the jury, is this verdict as presented and read the verdict of each of you, so say you all?

The Jurors: Yes.

The Court: Do you desire to have the jurors polled individually?

Mr. Larsen: No, your Honor.

Mr. Steele: No.

The Clerk: Is it ordered the verdict be filed, your Honor?

The Court: The Clerk will enter the verdict.

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of December, A.D. 1949.

/s/ VIRGINIA K. PICKERING,
Official Reporter.

[Endorsed]: Filed December 27, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 17, inclusive, contain the original Indictment; Verdict; Notice of Motion for New Trial; Judgment and Commitment; Notice of

Appeal; Statement of Ground on Appeal; Designation of Record on Appeal and Substitution of Attorneys and full, true and correct copies of minute orders entered October 3, 1949, and November 14, 1949, which, together with the original reporter's transcript of proceedings on November 1 and 2, 1949, and original exhibits 1, 1-A, 1-B, 1-C and 1-D, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.40 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29th day of December, A.D. 1949.

EDMUND L. SMITH,
Clerk,

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12443. United States Court of Appeals for the Ninth Circuit. Carl J. Schiros, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed December 30, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 12443

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL J. SCHIROS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT CARL J. SCHIROS' OPENING BRIEF ON APPEAL.

DAVID SILVERTON,

639 South Spring Street, Los Angeles 14,

Attorney for Defendant, Appellant Carl J. Schiros.

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No. 12443

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL J. SCHIROS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT CARL J. SCHIROS' OPENING BRIEF ON APPEAL.

Jurisdictional Grounds of Appeal.

This is an appeal taken under Rule 37 of 18 U. S. C. A. 302, from an indictment in two counts against the defendant Carl J. Schiros, the first for possession of counterfeit bills and the second count for uttering the bills in violation of Section 472 of the Criminal Code and Practice Act, 18 U. S. C. A.. The jury brought in a verdict of guilty in both counts and the court sentenced the defendant for two years on each count to run concurrently.

Proceedings on the Trial.

The instructions are set out at pages 102 to 113 of the Transcript. A motion for new trial [Tr. 12] appeal was filed November 1949 [Tr. 11]. The new trial was denied.

The case was tried by introducing the testimony of an admitted wrongdoer before the defendant took the stand, and it is contended that no proper foundation was laid connecting defendant with the possession of the alleged counterfeited notes or uttering them, and the court erred in submitting the action to the jury before a proper *corpus delicti* was proven. John Wyatt, a witness for the Government [Tr. 14, 16, 18], speaking of his alleged conversation with the defendant about making money, it is contended that this did not even state facts to raise a suspicion of guilt of the defendant. He said there:

“Q. What did you say? A. I don’t know the exact words.

Q. What else did he say about money? A. Nothing that I know of.”

Page 21 of Transcript in a further conversation about money, when asked if some ten dollars in an envelope shown to him were part of those passed by him [Tr. 22], replied:

“A. I don’t whether they are the ones, they look like it.”

Page 24 he stated how he and his wife cashed the bills until her arrest [p. 25] for so doing. His wife, Bonnie Ruth Wyatt [Tr. 38], stated that she had no conversation with the defendant but remembered that she had met him once at her house when a man named Joe when he wished

to see Miss Shaw brought him there. The defendant remembered meeting her there. He allowed the officers to search his house and no bills were found. He denied having had any bills or uttering any. His testimony is clear and lucid and set out on page 74 of the Transcript. When asked if he recognized John Wyatt from his picture while it was shown to him in an automobile, he stated that he did not, but when he met him personally he admitted that he had seen him before.

The testimony of Chester Morris, the bartender at the Whittier Cafe, a relative of witness John Wyatt, is given on page 81 of the Transcript, and that of Victor D. Cali, page 58; of George Snellback, page 74; Mary Gertrude Morris, waitress at the Whittier Cafe, page 54; Ruth Shope, cook at cafe, page 49, and John D. Didier, pages 44-47 (owner of cafe). These were all witnesses for the Government, Messrs. Cali and Snellback being officers of the Government.

Appellant contends that the court committed material fundamental errors in its charge to the jury. He charged the jury as if the case were a conspiracy case. His stating that the Wyatts were accomplices tended to give the jury the idea that the defendant was the one they were accomplices with, which would tend to convey the idea that the defendant was guilty. The court failed to fully explain the rear issues in the case as to the meaning of Section 472, Title 18, and also failed to fully enlighten the jury as to the effect of the presumption of innocence of the defendant and to advise the jury of the effect and bearing of such presumption upon the duty of the jury to acquit the defendant if with the weight of the presumption they were in doubt about the guilt of the defendant. These errors were such fundamental material jurisdictional errors

that no objection in giving the instructions was necessary for the defendant to avail himself of them and more specially are those on page 111 of Transcript reading: "In cases where two or more persons, etc.," proper to be given in a conspiracy case where after overt act of conspiracy is proven the acts of accomplices conspirators are admissible. They are not admissible in the case at bar unless the proof shows that the defendant aided and abetted in the commission of the alleged crime. (*Nebbelink v. U. S.*, 73 F. 2d 678.)

Also the instruction on page 112 reading:

"In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant as well as the declarations and admissions if any."

This does not limit the application to facts or circumstances material to the issue involved nor does it consider the necessity of establishing a *corpus delicti* before defendant's admission would be admissible.

It is fundamentally misleading and under the doctrine of *Robertson v. U. S.*, 171 F. 2d 345, where it is said:

"Where errors complained of were plain, and natural and probable influence of such errors on the jury was prejudicial and right of defendant to a fair and impartial verdict of the jury was substantially affected. Courts of Appeal would take notice of errors, though they were not brought to the trial court's attention. Federal Rules of Criminal Procedure, Rules 51, 52b, 18 U. S. C. A." (See also p. 36 (2-4).)

Likewise *People v. Dorland*, 2 Cal. 2d 243.

In *Strickland v. U. S.*, 155 F. 2d 167, it is said:

“Where circumstantial evidence is relied upon to sustain a conviction, the inferences that may be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence.”

Though it is a general rule that, unless a motion to direct a verdict was made, an appellate court will not consider the evidence in a criminal case, where there is not sufficient evidence to support conviction and error is apparent, then it becomes the duty of appellate court to reverse the judgment.

Likewise it is said in *Voght v. U. S.*, 156 F. 2d 308:

“(6) ‘*Corpus delicti*’ generally means that specific crime charged has actually been committed by some one.”

Taken from Words & Phrases, *Corpus Delicti*:

(P. 310): “An accused cannot be convicted on an extra judicial confession alone, but such confession must be coupled with evidence, circumstantial or otherwise, establishing the ‘*corpus delicti*’ by which is meant proof of the fact that the crime in question has been committed by someone. *McLemore v. State*, 111 Ark. 457, 164 S. W. 119, 120.”

“(7) Extra judicial admissions, declarations or confessions of accused may be considered in connection with other independent evidence in determining whether the *corpus delicti* is sufficiently proved: ‘Inclusive facts and circumstances tending *prima facie* to show the *corpus delicti* may be aided by the admissions or confessions of accused so as to satisfy the jury be-

yond a reasonable doubt, and so support a conviction, although such facts and circumstances standing alone would not satisfy the jury of the existence of a *corpus delicti*.' Hill v. State, 207 Ala. 444, 93 So. 460, 462."

The next paragraph in the instructions where it uses the word "admission" is objectional for the same reason. Anyone might easily fail to recognize the picture of a person he had seen only once, especially when shown to him in the early evening in an automobile. The instruction also is open to the objection that it does not fully explain to the jury as to its relation to the charge and also because the defendant is presumed to be innocent until proven to be guilty and unless this presumption was overcome by reasonable evidence of guilt that it was the duty of the jury to find the defendant not guilty on the ground of reasonable doubt of guilt.

In view of the aforesaid statements of law and fact above set forth by denying the new trial appellant contends that by the judgment against him herein he has been deprived of his liberty in violation of his constitutional rights under the California Constitution, Article 1, and Amendment XIV of the United States Constitution, and also the constitutional rights were denied in making the judgments run concurrently, as it is contended under Section 472 of Title 18, U. S. C. A., possession includes utterance, and that the charge embraces only one alleged crime.

POINTS AND AUTHORITIES.

The Court Committed Jurisdictional Prejudicial Error on the Trial as Follows:

I.

In admitting declarations of the accomplices Wyatt against the defendant's actions made outside of defendant's presence. Such declarations are not admissible.

People v. White, 35 Cal. App. 2d 61.

Likewise:

Robertson v. U. S., 171 F. 2d 345;

Vogt v. U. S., 156 U. S. 108;

Nebbelink v. U. S., 73 F. 2d 678.

These last two cases hold that this Honorable Court may consider fundamental lack of jurisdiction at any time it appears, even when not objected to on the trial, doubtless following 12(b), 28 U. S. C. A., of the Federal Rules of Civil Procedure, following Section 723(c).

The corroborating evidence must tend to connect defendant with the crime.

People v. Shaw, 17 Cal. 2d 802;

People v. Braun, 31 Cal. App. 2d 593;

People v. Bender, 27 Cal. App. 2d 175.

To prove criminal intent more than mere suspicion is necessary.

People v. Lima, 25 Cal. 2d 573.

II.

The court erred in giving the instructions as above set forth herein.

III.

In sentencing the defendant concurrently as it is claimed possession and utterance are all one crime.

In *Price v. U. S.*, 53 App. Dec. 164, 289 Fed. 562, where it is said:

“An indictment based on Penal Code sec. 151 Comp. St. 10321) and alleging that defendant had in his possession a counterfeit obligation and did then and there with intent to defraud utter the same as true and genuine, charges only a single offense.” (See also p. 563.)

Likewise, *Swartz v. U. S.*, 160 F. 2d 718.

IV.

The failure of the trial judge to fully explain to the jury the charge has been held reversible error.

United States v. Max, 156 F. 2d 16, following
United States v. Noble, 155 F. 2d 315.

V.

Referring to the Wyatts as accessories was also error as it might be inferred the defendant was guilty.

United States v. Monroe, 164 F. 2d 471.

VI.

The failure of the court to instruct the jury about the effect of the presumption of innocence as to its verdict.

The court in *Blinn v. U. S.*, 68 F. 2d 484, 487, infers:

“The failure of the court to inform the jury what was a presumption of innocence and it required an acquittal of the defendant unless his guilt was es-

tablished by sufficient evidence to carry it beyond the domain of reasonable doubt.”

Likewise:

Dodson v. U. S., 23 F. 2d 401, 403;

Davis v. U. S., 160 U. S. 469.

And also referred to in *Strickland v. U. S.*, 155 F. 2d 167.

In *Blinn v. U. S.*, the court said:

“Presumption of innocence is conclusion drawn by law in favor of one brought to trial on criminal charge, and requires acquittal unless guilt is established by sufficient evidence.”

VII.

The court erred in denying a new trial.

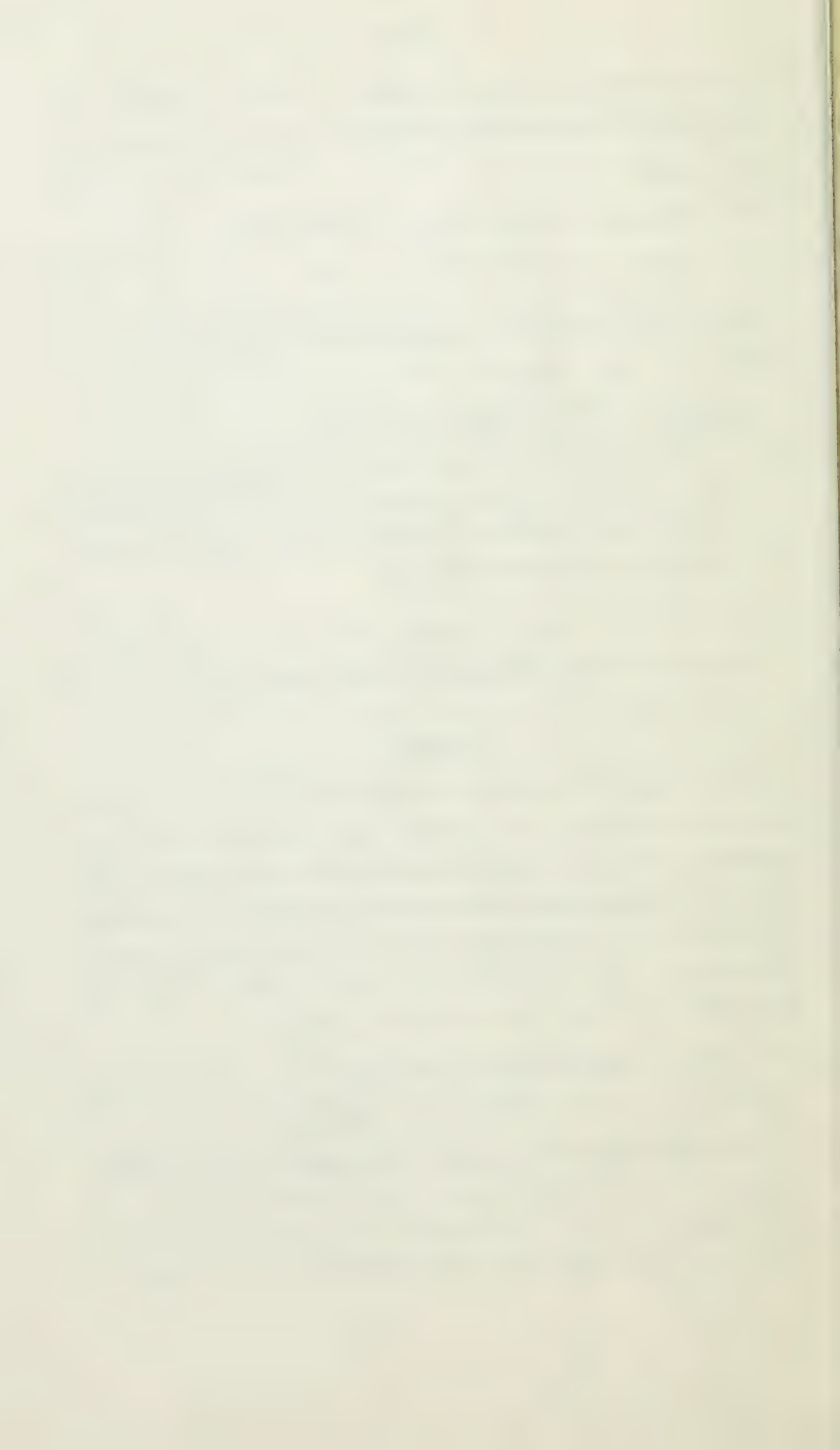
Prayer.

For the manifest prejudicial fundamental errors in the trial of this action it is respectively submitted that the verdict of the jury should be set aside and annulled and the order for judgment, the judgment and the commitment be annulled and a new trial had herein with costs of appeal to appellant and such other and further relief be granted as to the court may seem meet and proper.

Respectfully submitted,

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Attorney for Defendant, Appellant Carl J. Schiros.



No. 12443.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL J. SCHIROS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

FILED

AUG 11 1950

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No. 12443.

United States Court of Appeals

FOR THE NINTH CIRCUIT

CARL J. SCHIROS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Jurisdictional Statement.

Appellant was indicted under Section 472 of Title 18, of the United States Code, on September 21, 1949 [R.¹ 2-2A]. The District Court had jurisdiction of the cause under Section 3231 of Title 18 of the United States Code. The offenses charged were committed in Los Angeles County, within the Central Division of the Southern District of California.² Judgment was entered on November 14, 1949 [R. 9-10]. Notice of Appeal was filed on November 15, 1949 [R. 10-11]. This Court has jurisdiction under Section 1291 of Title 28 of the United States Code.

¹References preceded by the letter "R." are to the printed "Transcript of Record"; and those by "A. B." to Appellant's Opening Brief.

²The Indictment so charged [R. 2-2A]. Appellant does not attack on ground of lack of venue. Evidence supported it.

Statement of the Case.

On September 21, 1949, the Federal Grand Jury at Los Angeles returned an Indictment against Appellant in two counts, which was filed on that day in the United States District Court for the Southern District of California, Central Division [R. 2-2A]. Count One of the Indictment charged Appellant with keeping in his possession and concealing 150 falsely made, forged and counterfeited United States ten dollar treasury notes with intent to defraud, knowing the same to be falsely made, forged, and counterfeited. Count Two of the Indictment charged Appellant with passing, uttering, publishing, and selling, and attempting to pass, utter, publish and sell, the said notes to John William Wyatt, with intent to defraud, knowing the same to be falsely made, forged and counterfeited.

On October 3, 1949, Appellant pleaded not guilty to both counts [R. 3]. Trial was commenced before a jury on November 1, 1949 [R. 14]. The jury found the Appellant guilty on both counts on November 2, 1949 [R. 116]. Appellant's motion for a new trial was denied on November 14, 1949 [R. 8].

On November 14, 1949, the Appellant was sentenced to imprisonment for two years on Count One and two years on Count Two, the sentence on Count Two to be consecutive to the sentence on Count One [R. 10]. Notice of Appeal was filed on November 15, 1949 [R. 10-11].

The Statute Involved.

Section 472 of Title 18, United States Code provides:

“Whoever with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000.00 or imprisoned not more than fifteen years, or both.”

The Facts.

On August 26, 1949, Bonnie Ruth Wyatt was arrested in Pasadena for passing a counterfeit ten dollar bill at Nash's Department Store. She took the arresting officers to a locked, parked automobile nearby and when the automobile was opened, numerous counterfeit \$10.00 notes were found [R. 41-42, 59-60]. Agents Wasson, Carli, of the Los Angeles Office of the Secret Service were called to Pasadena and participated in the investigation there. A search of Bonnie Wyatt revealed that she had in her possession a number of counterfeit \$10.00 notes. Notes found in the automobile and those found on the person of Bonnie Wyatt all bore the same serial number [R. 61].

On August 29, 1949, John William Wyatt, husband of Bonnie Wyatt, surrendered to Agents of the United States Secret Service in Los Angeles. He told the agents he had met a man named “Jim” in a Los Angeles bar-room, about August 21, 1949, and had been approached

by "Jim" with a proposition whereby "Jim" would furnish him with counterfeit banknotes to pass and they would split the profit on the returns. Later Wyatt agreed to the proposition, took delivery of 150 \$10.00 notes from "Jim" on the morning of August 26, 1949, and after borrowing his brother-in-law's car, set out with his wife, Bonnie, to pass the notes. They passed notes in Whittier, El Monte and Alhambra before Bonnie was arrested. John Wyatt furnished the agents with the license number of "Jim's" car which he had noted on one of his meetings with "Jim" [R. 16-26].

Agents Carli, Swinney, and Schnellback located Schiros at his ice cream shop at 526½ South Hill Street, Los Angeles, on August 29, 1949, and placed him under arrest. On the evening of that day John Wyatt and Carl Schiros were brought face to face, at which time Wyatt said he recognized Schiros as "Jim" who had furnished him the notes. Agents present state that Schiros first denied knowing Wyatt when shown a picture of Wyatt, but later, when confronted by Wyatt, admitted that he had met Wyatt before [R. 63-65, 68-69, 78-79, 101-102]. Schiros called at Johnnie's Cafe in Whittier, California, in the evening of August 26, 1949, in company with Eleanor Shaw, sister of John Wyatt. Wyatt's mother-in-law and brother-in-law were employed in this cafe which was frequented by Wyatt and his wife. Arresting agents state that at the time of his arrest Schiros denied knowing Eleanor Shaw [R. 46-55-56, 63].

Carl Schiros denied giving Wyatt any \$10.00 notes and denied ever meeting Wyatt in a bar [R. 91]. He

stated it was dark on August 29, 1950, when the agents asked him if he recognized a picture of John Wyatt [R. 95], and that he immediately recognized Wyatt and so stated to the agents, when confronted by John Wyatt on the evening of his arrest, August 29, 1949 [R. 92, 95].

Summary of Argument.

The argument is divided into 4 parts. (1) The first part is in reply to Appellant's contention that no *corpus delicti* was proven on the trial, (2) the second part demonstrates that there was sufficient competent evidence to support a guilty verdict, (3) the third part answers Appellant's attack on the instructions to the jury, and his contention that certain necessary instructions were omitted, (4) the fourth part answers Appellant's assertion that the sentence was illegal, in that both counts of the Indictment embrace but one crime.

ARGUMENT.

I.

There Was Sufficient Proof of the *Corpus Delicti*.

Appellant states in his brief (A. B. 2) that the trial court erred in submitting the case to the jury before a proper *corpus delicti* was proven. He also speaks in his brief of “the necessity of establishing a *corpus delicti* before defendant’s admission would be admissible” (A. B. 4), without specifying just what amounts to an admission by the defendant in the Transcript of Record. A search of the authorities reveals no rule requiring establishment of a *corpus delicti* before a defendant’s admission would be admissible, although there is some authority for a rule that antecedent to the receipt of a confession, the prosecution must prove the *corpus delicti*. *Vogt v. United States*, 156 F. 2d 308, 310. Admissions of Appellant first appear during the testimony of Agent Carli [R. 65]. The *corpus delicti* was proven considerably before that stage of the trial, as will be shown.

The question of whether a *corpus delicti* has been proven almost always arises when the prosecution’s case has rested to some extent on a confession or on admission of the defendant. *United States v. Di Orio*, 150 F. 2d 938; *Pines v. United States*, 123 F. 2d 825; *Vogt v. United States*, 156 F. 2d 308; *Evans v. United States*, 122 F. 2d 461. In fact, the Government found no cases where the question was raised in any other situation. In the *Evans* case, cited above, the Court gave expression to the general rule as follows:

“It is the law that unless corroborated by independent evidence of the *corpus delicti*, the extra-

judicial confession or declarations of a defendant charged with crime are not sufficient to authorize a conviction.”

A good definition of *corpus delicti* appears in the *Vogt* case, cited above, at page 310 of the report, where the Court adopts the definition in 14 Am. Jur. 758, Sec. 6, which is as follows:

“Generally speaking, the term ‘*corpus delicti*’ means, when applied to any particular offense, that the specific crime charged has actually been committed by someone. It is made up of two elements: (1) That a certain result has been produced, for example, a man has died or a building has been burned; and (2) that some person is criminally responsible for the act. It has been said that the *corpus delicti* consists of the facts that a crime has been committed and that the defendant was implicated in the crime. This definition, however, is inaccurate, since if true, all that would be necessary to convict of a crime would be to prove the *corpus delicti*.”

Although the argument of Appellant with respect to the *corpus delicti* is not set out with clarity in his brief, an examination of the evidence indicates that any argument on that score by Appellant is untenable. Applying the definition set out above to evidence in this case, we find ample to establish a *corpus delicti*. The testimony of John Wyatt is sufficient in itself for that purpose [R. 15-37]. His testimony shows possession by someone of counterfeit ten dollar notes on August 26, 1949, in Los Angeles County [R. 20, 33], and shows further that this same person aided, assisted, induced, and procured Wyatt to utter and pass the same notes. The actual counterfeit nature of the notes is shown by Wyatt’s testimony that he was arrested and convicted for his possession of them

[R. 25, 26, 37]. In addition to John Wyatt's testimony, we have that of Mrs. Wyatt, which corroborates portions of the testimony of Mr. Wyatt [R. 39-44], and that of Agents Carli and Schnellback, which confirm the counterfeit nature of the money described by Mr. and Mrs. Wyatt [R. 59-80]. Of course, other testimony and evidence identified Schiros as the subject of John Wyatt's Testimony, linking him to the *corpus delicti*, but this aspect of the evidence will be considered properly in the next part of the argument.

Any consideration of the sufficiency of the evidence proving the *corpus delicti* must take into account the rule as to the weight of evidence necessary for its establishment. It is set out in *Flower v. United States*, 116 Fed. 241, at page 246, in this language:

“ . . . full proof of the body of the crime,—the confession, is not required by any of the cases, and in many of them slight corroborating facts were held sufficient.”

II.

There Was Sufficient Competent Evidence to Support the Verdict.

After conviction, the Court of Appeals, in determining whether the evidence was sufficient to support conviction, will not weigh evidence or determine credibility of witnesses, but will take that view of evidence with inferences reasonably and justifiably to be drawn therefrom, most favorable to the Government.

Myers v. United States, 6 Cir., 94 F. 2d 433, cert. den. 304 U. S. 583, rehearing denied 305 U. S. 670;

Glasser v. United States, 315 U. S. 60;

Henderson v. United States, 143 F. 2d 681.

There is a suggestion in Appellant's brief (A. 2), that the testimony of John Wyatt, an admitted wrongdoer, was not competent. But it is clear that the jury by its verdict rejects as unworthy and accepts as worthy the testimony of various witnesses, and when the jury has made its choice, by its verdict, the Appellate Court is bound thereby. In *Pasadena Research Laboratories v. United States*, 169 F. 2d 375, 9 Cir., at page 380, this Court said:

“ ‘To clarify the matter for once and for all, we wish to restate plainly that this Court is not concerned with the weight of the testimony adduced below. Questions of credibility were for the trial court.’ ”

The only question presented, then, is whether, viewed in the light most favorable to the Government, there was any substantial evidence to support the verdict. In this regard the Government directs attention to its brief treatment of evidence in the argument on *corpus delicti* above. Evidence which identifies Schiros as the criminal agent is convincing and ample. There is the testimony of John Wyatt, naming Schiros. There is the testimony of Carli and Schnellback concerning the Appellant's denials in an attempt to disassociate himself with the crime, and his subsequent admissions that he knew Wyatt, Marie Taylor, and had been to Johnny's Cafe and to the Wyatt house at 7219 Whitsett Avenue, Los Angeles [R. 63, 65, 66-67].

On appeal from conviction on the ground of errors relating to the sufficiency of the evidence to support the verdict, the duty of the Court of Appeals is limited to the determination of whether there was any substantial evidence to sustain the verdict. *O'Leary v. United States*, 9 Cir., 160 F. 2d 333. There was sufficient evidence here.

III.

No Error Was Committed by the Court in Its Charge
to the Jury.

A.

Appellant cites as error the Court's charge to the jury [R. 112] which is as follows:

"An accomplice is a person who has knowingly participated in the acts charged as constituting the offense. John and Bonnie Ruth Wyatt are accomplices. The testimony of an accomplice should be scrutinized carefully by the jury and you should act upon the testimony of an accomplice with caution and care."

Appellant contends that the instruction tended to give the jury the idea that Schiros was the one they were accomplices with. It is strange that Appellant should attack an instruction which admonishes the jury to "act upon the testimony" of the Wyatts with caution and care. To read into the instruction the inference suggested by Appellant would be a distortion difficult to conceive. The instruction benefits Appellant, and his attack is without merit. It is probably error to omit the instruction in cases where accomplices have testified.

The case relied upon by Appellant, *United States v. Monroe*, 164 F. 2d 471 (A. B. 8), doesn't support his assertion of error. In that case the Appellant objected to an instruction which designated another as a co-conspirator on the ground it took from the jury the consideration of a vital factor in a conspiracy trial. The case is not in point.

B.

Appellant contends that “the Court failed to fully explain the real issues in the case as to the meaning of Section 472 of Title 18 . . .” (A. B. 3). In support of this contention the Appellant cites *United States v. Man*, 156 F. 2d 13, at page 16, and *United States v. Noble*, 155 F. 2d 315 (A. B. 8).

Once again the Appellant has cited cases which lend no support to his argument. In the *Man* case the Appellants claimed the Court “erred in that it failed to inform the jury of the issues involved and of the essentials of the crimes for which the defendants were tried.” The Court, at page 15, disposed of his claim of error by pointing out that, “The charge covered the necessary general elements with clarity and was meticulously fair.” In the *Noble* case the Court of Appeals of the Third Circuit reversed a conviction on the grounds that the trial court failed to instruct the jury on the essential elements of the crime charged. On page 316 the Court of Appeals stated:

“We think it is self-evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime committed.”

Appellant’s cases hold that the Court must instruct the jury as to the elements of the crime or crimes charged. That is precisely what the Court did in the instant case [R. 109, 110]. The instructions as to each count were indeed meticulous.

C.

The Appellant contends that the Court erred in that it failed to fully enlighten the jury as to the effect of the presumption of innocence (A. B. 3). This is not so. Had the Court done more in this direction it would have approached redundancy. On pages 108 and 109 of the Transcript of Record appears a most complete instruction in that regard, beginning with the sentence, "The law does not require any defendant to prove his innocence, which, in many cases, might be impossible . . ." And at the top of page 112 of the Transcript of Record we have the familiar and accepted instruction on the burden of proof in criminal cases.

D.

The Appellant objects to an instruction on page 111 of the Transcript of Record but qualifies his objection by stating that the instruction is objectionable unless proof shows that defendant aided and abetted in the commission of the alleged crime (A. B. 4). Subject instruction is as follows:

"In a case where two or more persons are engaged in the commission of a crime, the guilt of the accused may be established without proof that the accused did every act constituting the offense."

This instruction is a preface to a recitation of Section 2(a) and 2(b) of Title 18, United States Code, which provisions have the effect of enlarging the potential field of principal offenders against the laws of the United States. The instruction is a correct statement of law when given in conjunction with the Sections which follow it. Even if we were to accept Appellant's qualification, the evidence shows Schiros as one counseling, inducing, procuring and causing the unlawful activity with which he is charged in Count Two of the Indictment.

E.

Appellant asserts that an instruction appearing on page 112 of the Transcript of Record constituted prejudicial error in that the Court did not limit its application to facts or circumstances material to the issue involved and failed to instruct on the role of *corpus delicti* in regard to defendant's admissions (A. B. 4). The instruction is as follows:

“In determining the question, you are to consider all the facts and circumstances in the case which touch the conduct of the defendant as well as the declarations and admissions, if any.”

No qualifying language was needed. The scope of the jury's consideration was properly defined by the phrase, “facts and circumstances *in the case*” (emphasis added). If the facts and circumstances are part of the case, *i. e.*, the evidence, they would be proper to consider if they touch the conduct of defendant.

No instruction concerning *corpus delicti* would be improper. It is a matter of law for decision of the Court.

In concluding this discussion of Appellant's attack on the Court's instructions, it should be noted that defense counsel interposed no objection to the instructions when given the opportunity by the Court [R. 114-115]. It is clear that under the provisions of Rules 30, 52 of the Federal Rules of Criminal Procedure (Sec. 687 ff., Title 18, U. S. C.), where no exception is taken to instructions, the Appellate Court will not consider alleged error in instructions unless substantial prejudice resulted. If there be error in the instructions, either in the giving or in the omission, in this case, it was not fundamental, resulting in substantial prejudice to the Appellant.

IV.

Under the Provisions of Section 472 of Title 18, United States Code, Several Distinct Offenses Are Provided for.

The Appellant contends that consecutive sentences given him are improper because possession and utterance are the same offense under Section 472 of Title 18, United States Code (A. B. 6). This same argument was advanced by the Appellant in *Ross v. Hudspeth*, 108 F. 2d 628. In that case Appellant was tried under a four count indictment charging him with uttering and with possessing two different notes. He claimed, on appeal, that Count One, which charged uttering, and Count Two, which charged possessing the same note, charged but one offense. But the Court rejected this argument and held that the statute (then Sec. 265 of Title 18, U. S. C.) defined two groups of offenses, saying at page 629:

“It is obvious that the statute defines two groups of offenses: (1) passing, uttering, publishing, or selling a falsely made, forged, counterfeited, or altered obligation of the United States; with intent to defraud, and (2) bringing into the United States, possessing, or concealing, with intent to defraud, a falsely made, forged, counterfeited, or altered obligation of the United States, with intent to pass, publish, alter, or sell the same, . . .”

The maximum sentence which could have been imposed on Appellant was twenty years imprisonment and \$10,000 fine. There is no illegal sentence here nor is there hardship.

Conclusion.

The crimes here charged were passing, uttering, publishing, and selling and attempting to pass, utter, publish and sell, with intent to defraud; and keeping in possession and concealing with intent to defraud, 150 counterfeit ten dollar notes. The statute under which the Indictment was brought is sufficient. The evidence points positively to guilt. The Court's instructions were proper and sufficient. The sentence was correct. Judgment below should be affirmed.

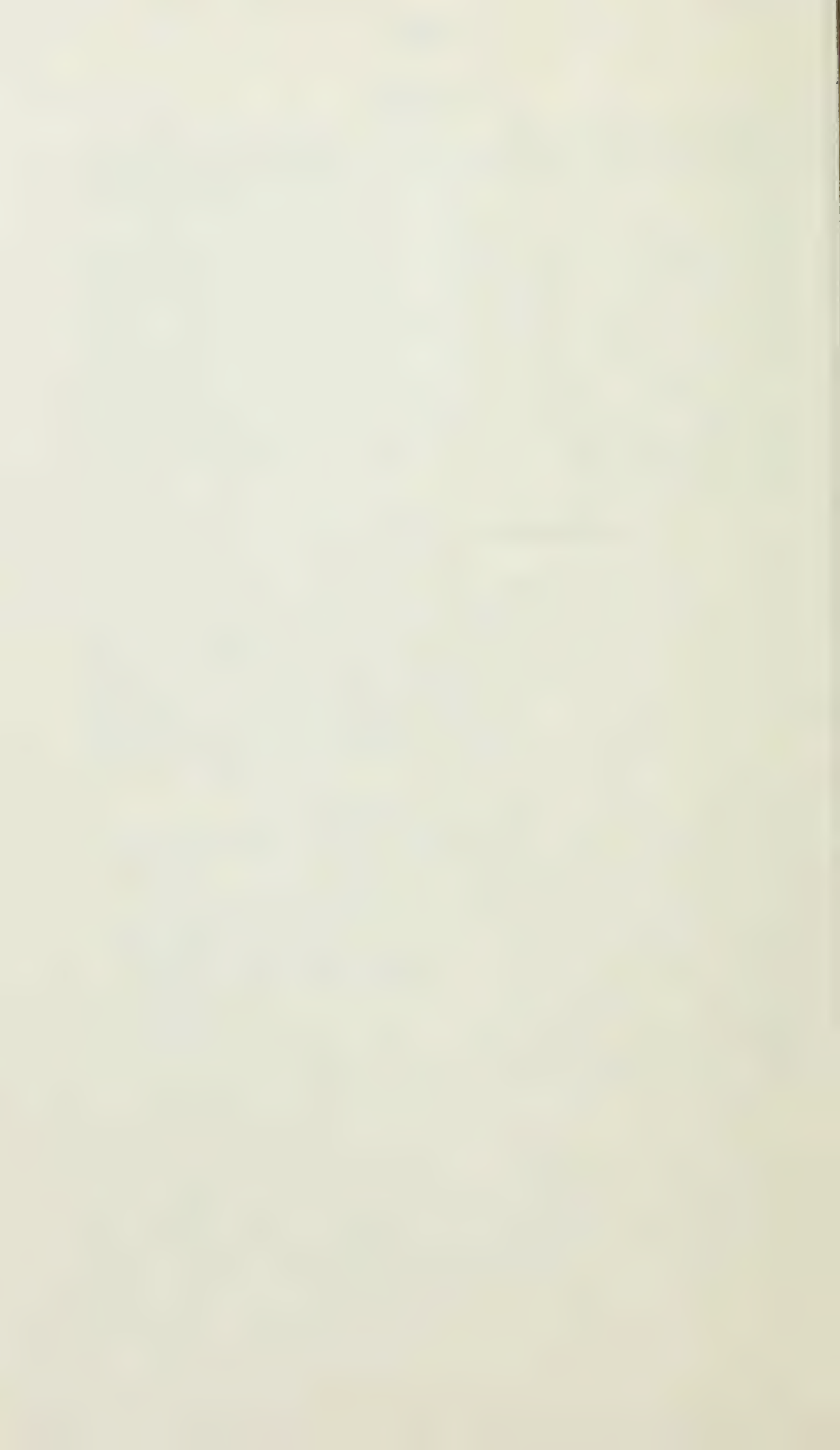
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No. 12,447.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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vs.

UNITED STATES OF AMERICA,

Appellee.

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No. 12,447.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES T. HAINES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

Appellant was indicted under Section 471 of Title 18, United States Code, on March 9, 1949 [Clk Tr. p. 2].¹ The offense was committed in Los Angeles County, California. On April 27, 1949, defendant (appellant) entered a plea of guilty to the offense charged in the Indictment [Clk. Tr. p. 10] and he was sentenced to the custody of the Attorney General for imprisonment for a period

¹References preceded by "Clk. Tr." are to the Clerk's Transcript.

of five years [Clk. Tr. p. 20]. Upon motion of defendant (appellant), the Court set aside the plea of guilty on June 24, 1949 [Clk. Tr. p. 34], and the cause was set for trial. The case was tried to the Court without a jury on September 8, 1949, and on September 9, 1949, the Court found defendant (appellant) guilty as charged. On October 24, 1949, defendant (appellant) was sentenced to imprisonment for a period of five years, and judgment was so entered [Clk. Tr. p. 53].

The District Court had jurisdiction of this cause of action under 18 U. S. C. 3231.

There was no Motion for New Trial. Notice of Appeal was filed on October 28, 1949 [Clk. Tr. p. 56].

This Court has jurisdiction under 28 U. S. C. 1291-1294.

II.

Statute Involved.

The Indictment charges a violation of Section 471 of Title 18, United States Code, which provides:

“§471. Obligations or securities of United States.

“Whoever, with intent to defraud, falsely makes, forges, counterfeits, or alters any obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.” (Old Section 262 of Title 18, United States Code.)

III.

Statement of the Case.

On March 9, 1949, the Federal Grand Jury at Los Angeles, California, returned an Indictment in one Count against James T. Haines, appellant herein. The Indictment was filed on the same date, in the United States District Court in and for the Southern District of California, Central Division, and charged that the defendant (appellant):

“On or about January 29, 1949, in Los Angeles County, California, with intent to defraud, did falsely make, forge, and counterfeit, and did aid and assist in the making, forging, and counterfeiting of four \$100.00 Federal Reserve Notes purporting to be Federal Reserve Notes of the Federal Reserve Bank of San Francisco, obligations and securities of the United States.”

Appellant's Motion to Withdraw Plea of Guilty was granted, and on April 27, 1949, appellant pleaded not guilty to the charge in the Indictment.

Trial to the Court without a jury was commenced on September 8, 1949, and on September 9, 1949, the Court found defendant (appellant) guilty as charged in the Indictment.

Motion for New Trial was not filed.

Appellant assigns as error the judgment of conviction, on three main grounds, namely:

1. That the evidence was insufficient to support a verdict of guilty, and that the verdict was contrary to the law and evidence;

2. That the Court erred in receiving the alleged confessions of defendant (appellant) in evidence [Gov't Ex. 15 (written confession) and the oral confession to Assistant U. S. Attorney R. H. Kinnison];

3. That the Trial Court erred in not granting a Motion for New Trial and to set aside the verdict which he had rendered without an intelligent understanding of the Waiver of Trial by Jury filed by defendant (appellant).

The Assignment of Errors will be considered by the Government in its Brief in the order as above set forth.

IV. Facts.

Appellant became acquainted with one Robert Harold White on or about January 11, 1948, when he was sent to the White residence by an ex-convict, one Joseph McKinney, with whom White had shared a cell at the penitentiary at Reno, Nevada [Rep. Tr. pp. 15-16].² Appellant asked if McKinney had given White any information about how to make counterfeit bills, and when White replied that McKinney had said very little about it, appellant stated that he had been experimenting with the process for some time, and that he wanted White to help him in these experiments. Appellant then took White to his home, and showed White the fruits of his experiments in making counterfeit notes by photographing reproductions [Rep. Tr. pp. 15-17]. Appellant stated to White that McKinney used stripping film to regulate the size of the photographic reproductions. He then went with White to the Eastman

²References preceded by "Rep. Tr." are to the Reporter's Transcript.

Kodak Company to purchase the stripping film [Rep. Tr. p. 19, line 19, to p. 20, line 9]. The experiments in reproducing counterfeit notes were carried on in appellant's residence [Rep. Tr. p. 21, lines 7-9]. Technical information was obtained by White and appellant from various sources and persons, including one Dr. Diehl and one Harry Funk, neither of whom suspected that appellant and White were involved in criminal activities [Rep. Tr. p. 21, line 25, to p. 22, line 1].

In July, 1948, in order to have electricity available, White and appellant moved to a laboratory on Rinaldi Street where the negative of the \$100.00 bills [Gov't Exs. 1, 2, 3, 13 and 14] was made either by appellant alone, or by appellant and White together [Rep. Tr. p. 35, line 15, to p. 36, line 19]. A negative was taken to appellant's residence where the print was made [Rep. Tr. p. 36, line 20], and on January 11, 1949, appellant made the counterfeit note [Gov't Ex. 14] and gave it to White to pass at Brown's Market. White was present when the counterfeit notes [Gov't Exs. 1, 2, 3] were made [Rep. Tr. p. 41, lines 25-26].

Appellant was arrested between 9 and 10 A. M. on March 3, 1949, by Secret Service Agent Carl L. Eliason whom appellant knew to be an agent in the U. S. Secret Service acting in his official capacity [Rep. Tr. p. 180, line 16, to p. 181, line 9], and was told by Agent Eliason that he need not make a statement but if he made such a statement it could be used against him [Rep. Tr. p. 97, lines 9-15]. He was immediately taken to the office of the Secret Service in the Federal Building, Los Angeles [Rep. Tr. p. 90, line 9, to p. 91, line 18]. Upon arrival at the Secret Service office, appellant was questioned by Secret Service Agent Eliason, and Agents Harold C. Polenz and

Fred C. Wasson were present part of the time. Appellant related his participation in the counterfeiting activities [Rep. Tr. p. 91, line 24, to p. 93, line 7].

During the course of the interrogation, appellant stated that he had two or three negatives of \$100 bills concealed in a drawer at the laboratory on Rinaldi Street; that the new owner of the laboratory was taking possession of same that day, and that he (appellant) was willing to take the Agents to the place of concealment of the negatives [Rep. Tr. p. 93, lines 7-24].

Appellant was taken to the office of the United States Attorney for the purpose of ascertaining the advisability of procuring a Search Warrant for the laboratory. Assistant United States Attorney Ray H. Kinnison again advised appellant that any statement he made might be used against him [Rep. Tr. p. 226, lines 7-11]. He at that time related to Mr. Kinnison facts concerning his participation in the counterfeiting activities and the making of Government Exhibits 1, 2, 3 and 14. Appellant then took Secret Service Agents Eliason and Polenz to the laboratory on Rinaldi Street [Rep. Tr. p. 94, lines 16-19], and at the conclusion of the search for the negatives, appellant was returned to the office of the Secret Service where he made a written statement as to his counterfeiting activities [Gov't Ex. 15].

Appellant was placed in the County Jail on the evening of March 3, 1949, and on the following morning he was arraigned before Commissioner Howard W. Calverley [Rep. Tr. p. 105, line 22, to p. 106, line 1].

V.

ARGUMENT.

The Evidence Was Sufficient to Support the Verdict.

On appeal from conviction on the ground of errors relating to the sufficiency of the evidence to support the verdict, the duty of the Court of Appeals is limited to the determination of whether there was any substantial evidence to sustain the verdict.

U. S. v. Francis, 172 F. 2d 1.

(1) The Admissibility and Effect of the Testimony of an Accomplice.

Appellant contends that the evidence was insufficient to support the verdict, and that it was contrary to law and the evidence on the ground that the prosecution of the case was based primarily on the testimony of Robert White, the accomplice of the appellant (App. Br. pp. 4-5), and that the evidence in this case was that the defendant (appellant) was an “aider and abettor” in making of counterfeit bills (App. Br. p. 4).

It is well settled that in the Federal Courts a defendant can be convicted on the uncorroborated testimony of an accomplice. See, *e. g.*:

Todorow v. U. S., (9 Cir. 1949) 173 F. 2d 439;

Caminetti v. U. S., (1917) 242 U. S. 470, 495;

Westenrider v. U. S., (9 Cir. 1943) 134 F. 2d 772, 774;

U. S. v. Wilson, 154 F. 2d 802, 805.

Under this well-settled rule of law, it is respectfully submitted that the testimony of Robert White [Rep. Tr.

pp. 13-42] is substantial evidence sufficient to sustain the verdict, without resorting to the additional and corroborating testimony present in this case.

Appellant cites the cases of *Sykes v. U. S.*, 204 Fed. 909, and *Dahly v. U. S.*, 50 F. 2d 37, in support of his contrary view. It is noted that the case of *Sykes v. U. S.*, decided in 1913, represents a small minority view in a different Circuit. The case of *Dahly v. U. S.*, *supra*, does not state the broad rule that the uncorroborated testimony of an accomplice is not substantial evidence sufficient to support a verdict but merely states that on the “exceptional facts in that case” (App. Br. p. 7, lines 3-4) the testimony of the accomplice was not substantial evidence sufficient to support a verdict. In addition to that portion of the opinion set out at length by appellant (App. Br. p. 7), the Court, in the next paragraph, at page 45, states—“But even giving full credence to his (accomplice Smith’s) testimony, yet the suspicious circumstances thus raised fall far short of being substantial evidence of the conspiracy charged and of Dahly’s connection therewith.”

In this case, the testimony of the accomplice White does not merely raise suspicious circumstances but shows the guilt of the appellant.

The Trial Judge, in rendering his verdict, took into consideration that the testimony of an accomplice should be looked on with caution, but nevertheless a conviction can be based upon it without corroboration. In rendering his verdict, the Trial Judge stated:

“There is sufficient evidence even if you eliminate White’s testimony, and I don’t see any reason why we should eliminate him here. The mere fact that he has been convicted of a felony does not warrant repudiating his testimony.

“You are a very adroit cross-examiner. You did not budge him in one respect by any question that you asked. This not your fault. You conducted a very adroit examination, but his story had all the earmarks of truth, and that is why it couldn’t be budged.” [Rep. Tr. p. 242, lines 7-16.]

“Furthermore, you can convict in the Federal Court on an accomplice’s testimony, assuming he was an accomplice, without corroboration. The corroboration rule does not apply in the Federal Court.

“As a matter of fact, I have devised an instruction which I give jurors, that while they should look to the testimony of an accomplice with caution, nevertheless, I say, if it carries conviction you can base your conviction upon that without any corroboration at all.” [Rep. Tr. p. 243, lines 7-15.]

“I am satisfied from the facts in the case, beyond a reasonable doubt, that the defendant is guilty of the offense charged.

“I shall not take the time to indicate in detail the grounds. They are not necessary, although at times we do. I have already indicated in my discussion with counsel why I believe that the story that both Mr. and Mrs. Haines told is preposterous and not worthy of belief; that their own contradictions and evasions condemn the story.

“I am also convinced that White’s story is credible. It is corroborated by the facts in this case, some of which I have already indicated.”

**(2) The Testimony of Robert White, Appellant's Accomplice,
Is Corroborated in This Case.**

Government's Exhibits 4 through 10 were found in the possession of the appellant at the time of his arrest [Rep. Tr. p. 11, line 13, to p. 12, line 5], more than three months after the appellant had last seen his accomplice, Robert White [Rep. Tr. p. 170, lines 5-22].

Government's Exhibit 10 referred to Kodalith film, which is a high contrast film, and is the film used in making a negative from which to make counterfeit notes when using a photographic process such as was used in making the counterfeit note [Gov't Ex. 13; Rep. Tr. p. 221, line 17, to p. 222, line 1].

Government's Exhibit 9 is a formula for sensitizing the solution to be applied to either film or paper.

Government's Exhibit 7 is a common green toner which could be used to produce the green color of the counterfeit note [Gov't Ex. 3; Rep. Tr. p. 222, lines 2-15].

The testimony of Robert White to the effect that the photographic promotion by appellant was a mere blind to gain technical knowledge in that Dr. Diehl never offered information to appellant but that it was asked for [Rep. Tr. p. 211, lines 12-22; p. 246, lines 15-19] is corroborated and bears out the facts.

Further corroboration is found in the confession made by the appellant to Assistant United States Attorney Ray H. Kinnison [Rep. Tr. p. 226, line 12, to p. 227, line 19] and the signed confession [Gov't Ex. 15] made in the presence of Secret Service Agent Carl L. Eliason.

Admissions and Confessions Were Properly Admitted in Evidence by the Trial Court.

The assignment of error due to the admission of appellant's confessions is not properly before this Court for decision.

1. *The Confessions Were Admitted Without Objection.*

The Appellate Court will not consider matters which are alleged as error for the first time on appeal, and such rule applies in criminal cases as well as civil cases unless in criminal cases the alleged error would result in manifest miscarriage of justice, or would seriously affect fairness, integrity, and public reputation of judicial proceedings.

Robertson v. U. S., 171 F. 2d 335;

Smith v. U. S., (9 Cir. 1949) 173 F. 2d 181;

Alberty v. U. S., (9 Cir. 1937) 91 F. 2d 461.

The introduction of the confessions in this case does not come within this exception. It is noted that the Trial Court reserved ruling on the admissibility of the confession until appellant's counsel had the opportunity to attack their admissibility on cross-examination when they were received in evidence without objection [Rep. Tr. pp. 97-106].

2. *Voluntary Confessions Obtained Without Duress, Threats or Undue Psychological Pressure, Unless Obtained During an Illegal Detention for the Purpose of Obtaining a Confession, Are Admissible in Federal Courts.*

Simon v. U. S., (9 Cir. 1949) 178 F. 2d 615, 619 (rehearing denied Jan. 16, 1950);

McNabb v. U. S., 318 U. S. 332, 63 S. Ct. 608,
87 L. Ed. 819;

Mitchell v. U. S., 322 U. S. 65;

Upshaw v. U. S., 335 U. S. 140, 69 S. Ct. 107.

The basic test of the admissibility of a confession is whether or not the confession was made voluntarily. This test was early recognized and was followed in all the cases cited by appellant (App. Br. p. 9, lines 18-26). The time elapsing between the arrest of the defendant and his arraignment before the United States Commissioner is merely a factor that is to be taken into consideration by the Trial Court in determining whether or not the confession was voluntarily obtained. The Supreme Court in *McNabb v. U. S.*, *supra*, did not state that a confession obtained prior to the arraignment of the accused required the rejection of the confession, but that under the facts and circumstances presented in that case, the confessions were not voluntarily made, and thus were inadmissible. Justice Frankfurter, at page 346, states:

“The mere fact that a confession was made while in the custody of the police does not render it inadmissible.” (Cases cited.)

3. *Scope of Review Where the Admission of a Confession Is Assigned as Error.*

The finding of the Trial Judge upon a preliminary question of fact, as a basis for admitting evidence such as a finding that the confession is voluntarily made by the defendant, is not reviewable on appeal.

This Circuit in *Lewis v. U. S.*, 74 F. 2d 173, at page 175, stated:

“The question to be determined by this Court with reference to the admissibility of the confession is whether or not the Court abused its discretion in admitting the evidence.”

Citing:

Mangrum v. U. S., (9 Cir.) 289 Fed. 213, 215;

Hale v. U. S., (8 Cir.) 25 Fed. 430, at 437.

In *Mangrum v. U. S.*, *supra*, the Ninth Circuit, in an opinion by District Judge Bean, the Court stated the rule to be:

“But, where on the trial of a criminal case a confession of the defendant is offered in evidence, it becomes necessary for the Trial Court to ascertain and determine, as a preliminary question of fact, whether it was freely and voluntarily made, and whether a previous undue influence, if any, had ceased to operate upon the mind of the defendant, and in such determination the court is vested with a very large discretion, which will not be disturbed on appeal, unless an abuse thereof is shown.” (Cases cited.)

There is nothing in the present case to show that the Court abused its discretion in admitting the confessions in question; in fact, the record shows to the contrary.

The Court was fully informed concerning appellant's signing of the Waiver of Trial by Jury. Counsel for appellant was satisfied of the voluntary character of the confessions, and apparently gave consent to their introduction in evidence when she raised no objection to their introduction in evidence.

4. *The Confessions Were Properly Admitted as Voluntary Confessions.*

The facts heretofore set forth, regarding the obtaining of the confessions (Appellee's Op. Br. p. 4) show the voluntary character of the confessions, and are corroborated by the testimony of the appellant himself. In regard to the confession taken by Secret Service Agent Carl L. Eliason [Gov't Ex. 15], appellant, on direct examination, testified:

"Q. Just tell us the conversation. Have you told us all that happened? A. No. I was there all day in the Federal Building, and after he talked to me awhile—we visited, he was very polite." [Rep. Tr. p. 157, lines 15-19.]

"Q. By Mrs. Root: Mr. Haines, did you tell Mr. Eliason 'I would like to state fully all I know about this case'? Did you tell him that? A. I did that and I don't know much about it to state to him. I told him what I did know." [Rep. Tr. p. 160, lines 3-8.]

When questioned by the Court, appellant testified as to whether the confession was voluntarily made, as follows:

"Q. The Court: So during the day you knew that while Eliason claimed to be your friend, that he said that you were being accused by White of participating in the counterfeiting of bills?

A. The Witness: He gave it to me as a remark. He said 'How much truth is there in it?' And I said, 'It is preposterous.' And he said, 'Let's go talk about it.' It was a situation there, like a couple of friends talking over the situation. I didn't regard it as an arrest. I regarded it as a friend of mine coming along. And he said, 'Get in, let's take a ride.'

Q. The Court: All right.

Q. By Mr. Hildreth: When Mr. Eliason first met you did he identify himself as an agent of the Secret Service? A. He didn't have to do that. I knew that he was. I knew him in his capacity.

Q. Did he tell you that he was on official business? A. No, he didn't say that at first. He did a few minutes afterwards. At first he said, 'Hi.' " [Rep. Tr. p. 180, line 16, to p. 181, line 9.]

As to the confession made by appellant, orally, to Assistant United States Attorney R. H. Kinnison, appellant testified on cross-examination:

"Q. By Mr. Hildreth: Did you have a conversation with an Assistant U. S. Attorney the morning you were arrested? A. Who would that be? You?

Q. No. Mr. Kinnison. A. That is his capacity? I see. I thought I did, yes.

Q. And did you regard Mr. Kinnison as a friend? A. Well, they were all friendly. They were all very polite to me. They were all very nice people." [Rep. Tr. p. 175, lines 1-12.]

5. *The Confessions Were Not Obtained at a Time When Appellant Was Being Illegally Detained, or Detained for the Purpose of Obtaining a Confession.*

A voluntary confession obtained during a legal detention is admissible.

Symons v. U. S., (9 Cir.) 178 F. 2d 615;

U. S. v. Upshaw, 335 U. S. 410, 69 S. Ct. 170.

Rule 5(a) of the Federal Rules of Criminal Procedure requires any person making an arrest without a warrant to take the arrested person, without unnecessary delay, before the nearest available United States Commission. Unnecessary delay is construed by this Court in *Symons v. U. S.*, *supra*, to require only that the arrested person

be taken before a Commissioner during his regular office hours. In this case, appellant voluntarily agreed to take Secret Service Agents to find two or three negatives of \$100 bills concealed in a drawer in a laboratory on Rinaldi Street. Immediate action was necessary as the new owner of that laboratory was that day taking possession of the premises [Rep. Tr. p. 93, lines 7-24].

The Commissioner's office was closed when appellant and the agents returned from the laboratory [Rep. Tr. p. 96, lines 9-12], and the appellant was arraigned the next morning before Commissioner Howard W. Calverley [Rep. Tr. p. 105, line 22, to p. 106, line 1].

This Circuit in the case of *Janus v. U. S.*, (9 Cir.) 38 F. 2d 431 at page 437, found that a detention during the night until the Magistrate had opened his office the following morning was reasonable. Moreover, the voluntary confession made prior to the time that the detention has become illegal for the purpose of procuring a confession is admissible.

In the case of *U. S. v. Mitchell*, 322 U. S. 65, 64 S. Ct. 896, 88 L. Ed. 1140, although the defendant was illegally held eight days, the Court accepted the record as showing that Mitchell promptly and spontaneously admitted his guilt within a few minutes after his arrival at the police station. Mitchell's confessions, therefore, were found to have been made before any illegal detention had occurred. The Court then stated in the *Mitchell* opinion:

"The illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures."

Thus, the holding in the *Mitchell* case was only that Mitchell's subsequent illegal detention did not render inadmissible his prior confessions.

The Appellant Intelligently Executed a Waiver of Trial by Jury, and That Waiver Is Binding Upon Appellant.

(1) Appellant's Third Assignment of Error That the Court Erred in Not Granting a Motion for New Trial Is Not Properly Before This Court.

The granting of or refusing a new trial rests in the discretion of the Trial Judge, and it being manifest the Trial Court did not act arbitrarily or capriciously nor upon any erroneous concept of the law, the Appellate Court may not substitute its judgment for that of the Trial Judge.

Gage v. U. S. (9 Cir., 1948), 167 F. 2d 122, at page 125;

U. S. v. Johnson, 327 U. S. 106, 66 S. Ct. 464, 90 L. Ed. 562;

Eagleson v. U. S., 172 F. 2d 194; cert. den. 336 U. S. 952, 69 S. Ct. 882, 93 L. Ed. 834.

It cannot be said that the Trial Court in this case acted arbitrarily, capriciously, nor upon any erroneous concept of the law for, in fact, the record discloses that no Motion for New Trial was addressed to the Trial Court.

(2) The Right of the Defendant to Waive a Trial by Jury.

Trial by jury in criminal cases is not jurisdictional but is a privilege which the accused may forego at his election.

Patton v. U. S., 281 U. S. 276, 50 S. Ct. 253, 84 L. Ed. 854.

There is no difference in substance between a complete waiver of a jury and consent to be tried by a number less than twelve. A Federal District Court has authority in

the exercise of sound discretion to accept a waiver of jury trial in a criminal case and to proceed to the trial and determination of the case with a reduced number or without a jury, the grant of jurisdiction by Title 18 U. S. C., Section 3231, being sufficient to that end. The Court further holds:

“* * * before any waiver can be effected the consent of the government counsel and the sanction of the Court must be had in addition to the express and intelligent consent of the defendant and the duty of the trial court in that regard is not to be discharged as a mere matter of rote but with sound and advised discretion with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof and with a caution increasing in degree as the offenses dealt with increase in gravity.”

NOTE: In the *Patton* case, after the commencement of a trial in the Federal Court before a jury of twelve men upon an indictment charging a crime punishment for which may involve a penitentiary sentence if one juror becomes incapacitated and unable to proceed further with his work as a juror, the defendant and the government through its official representative in charge of the case may consent to the trial's proceeding to a finality with eleven jurors and the defendant thus may waive the right to a trial and verdict by a constitutional jury of twelve men.

In *Adams v. U. S.*, 126 F. 2d 774, the Third Circuit Court held that the accused who is not a lawyer and defending his own case without assistance of counsel could not waive trial by jury without the help or advice of

counsel. In setting aside the decision of the Circuit Court, the Supreme Court said:

“The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.”

Adams v. U. S. ex rel. McCann, 317 U. S. 269, at page 275.

Where defendant without counsel acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel.

Johnson v. Zerbst, 304 U. S. 468.

(3) The Form and Sufficiency of the Defendant's Waiver of a Trial by Jury.

Whether there is an intelligent, competent, self-protective waiver of jury trial by accused, depends upon the circumstances of each case.

Adams v. U. S., *supra*, 317 U. S. 269, 126 F. 2d 774.

1. In the instant case the defendant was represented by counsel throughout all of the proceedings had in the District Courts and in particular by Gladys Towle Root

on the occasion when the Waiver of Trial by Jury was filed on September 7, 1949.

Where it appears by the record that a party was represented by counsel and went to trial before the Court without objection or exception, waiver of his right to jury trial will be presumed and he will be held in the Supreme Court to the legal consequences of such a waiver.

U. S. v. Harris, (1882) 106 U. S. 629, 1 S. Ct. 601, 27 L. Ed. 290;

McMullen v. Squire, 144 F. 2d 703;

Tompsett v. State of Ohio, 146 F. 2d 95; cert. den. 65 S. Ct. 916, 324 U. S. 869, 89 L. Ed. 1424.

The Court said at page 635:

“And though the right of trial by jury is a constitutional one, yet, this Court has declared that when it simply appeared by the record that a party was present by counsel and had gone to trial before the court without objection or exception a waiver of his right to a jury trial would be presumed and he would be held in this court to the legal consequences of such waiver. Citing *Kearney v. Case*, 12 Wall. 275.”

The sufficiency of the evidence establishing intelligent and understanding waiver of trial by jury.

McMullen v. Squire, 144 F. 2d 703.

“At the hearing accorded him in open court on the Writ of Habeas Corpus, appellant testified that he was induced by trade and promises and coerced by the United States Attorney to give up his right to trial by jury. The basis of this claim is his testimony that he traded his right of jury trial for the permission to take the deposition of one Coffelt. The

able judge who heard his testimony properly did not regard this claim. The record clearly shows that 10 days prior to the signing of the document relating to Coffelt's deposition, McMullen in open court and with advice of counsel had already waived the right to trial by jury. This declaration of coercion is obviously an afterthought based upon the peculiar language of the stipulation above quoted, relating to the deposition of Coffelt. This is a typical claim, without substance, met with habituality in habeas corpus cases dealing with hardened offenders with criminal records who balk not at perjury as to absent officials in order to convince a judge, who is alert to protect against the invasion of constitutional rights, that forfeited liberty should be restored. The Court committed no error in not giving credence to this claim."

Tompsett v. State of Ohio, 146 F. 2d 95; cert. den.
65 S. Ct. 916, 324 U. S. 869, 89 L. Ed. 1424.

In addition to the testimony set forth in Appellant's Opening Brief (App. Br. p. 11, line 6, to p. 15, line 9), the record shows that appellant's counsel, Mrs. Gladys Towle Root, related to the Court the circumstances appellant's signing of Waiver of Trial by Jury. The remarks of Mrs. Root are as follows:

"Mrs. Root: If your Honor please, I called Mr. Haines in approximately a week before the case was to be heard for trial. There was some discussion relative to whether or not the case could be continued again, and I suggested to him in that regard that it could not, in my opinion. We then discussed whether or not we were to have a jury, and I stated to him that in my opinion in this case, from what he had told me, that I would advise and recommend a waiver

of a jury, that I had the utmost of confidence in your Honor and I felt that you, sitting as a trial judge in this matter, were far superior to that of a jury, as predicated upon the facts of the case that he had given me. I therefore recommended that he waive a jury and that your Honor hear it sitting as a court and a jury. He said he would think about it and he would come back, and he did come back I think it was two days before and then a day before, and I told him I wanted to notify the clerk that we would not need a jury, in order to save the expense of the government if the jury was to be here for that one matter alone, and I wanted to get his opinion in advance, and he said that he would leave it entirely to my discretion, if I thought that was the better trial, certainly that was all right with him. And again in the morning I told him that it would be necessary for him to sign a waiver, and he signed it here in the court room.” [Rep. Tr. of Proc. Oct. 24, 1949, p. 14, line 16, to p. 15, line 15.]

At the time of sentence, the Trial Judge conducted a hearing with reference to appellant’s signing of the Waiver of Trial by Jury [Rep. Tr. of Proc. Oct. 24, 1949, p. 11, line 16, to p. 20, line 17]. At the conclusion of this hearing, the Trial Court found:

“The Court: I will state for the record that my own recollection of the facts, aside from what may have taken place outside my presence, is that this defendant, as the record will show, was asked orally by the clerk whether he wanted to waive a jury, first, and a statement was made either by the defendant or his counsel that he was going to waive a jury, on Tuesday morning, and that he was handed this blank, which was absolutely blank, didn’t have any signature,

that he signed it first, his attorney signed it next, Mr. Hildreth signed it third, whereupon it was handed to the clerk who handed it to me, whereupon I stated that the jury having been waived that I would try a jury case that day, and that this case was continued to the following day, on which day we began the trial which continued for two days. And in my opinion this defendant is not telling the truth when he states that he didn't know what was going on." [Rep. Tr. of Proc. Oct. 24, 1949, p. 18, line 21, to p. 19, line 11.]

VI.

Conclusion.

It is obvious from a consideration of the entire record that appellant was accorded a fair trial, and that there was substantial evidence to support the verdict. There were no errors in law in the rulings of the Trial Court, and the admission of the confessions was not improper. Although Motion for New Trial was not made by appellant, the Trial Court would not have erred in refusing to grant appellant a new trial.

Conviction should be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

NORMAN W. NEUKOM,

Assistant U. S. Attorney,

Chief of Criminal Division,

JACK E. HILDRETH,

Assistant U. S. Attorney,

Attorneys for Appellee.



No. 12448

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

FLORENCE K. LIVINGSTON, Executrix of the Will of Bronte M. Aikins, deceased (sued herein as B. M. Aikins) FLORENCE K. LIVINGSTON, executrix of the last will of Florence L. Kirchen, deceased, GEORGE B. PARKER, NELLE GRENVILLE PARKER, VERNON S. BATZ (also known as V. S. Batz), EDNA BATZ, D. M. JORDAN, GEORGE HAY CORPORATION, LTD., a corporation, HONOLULU OIL CORPORATION, a corporation, SEABOARD OIL COMPANY OF DELAWARE, a corporation and THE COUNTY OF KERN,

Appellees.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Northern Division.

APR - 5 1950

PAUL P. O'BRIEN, JR.

No. 12448

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

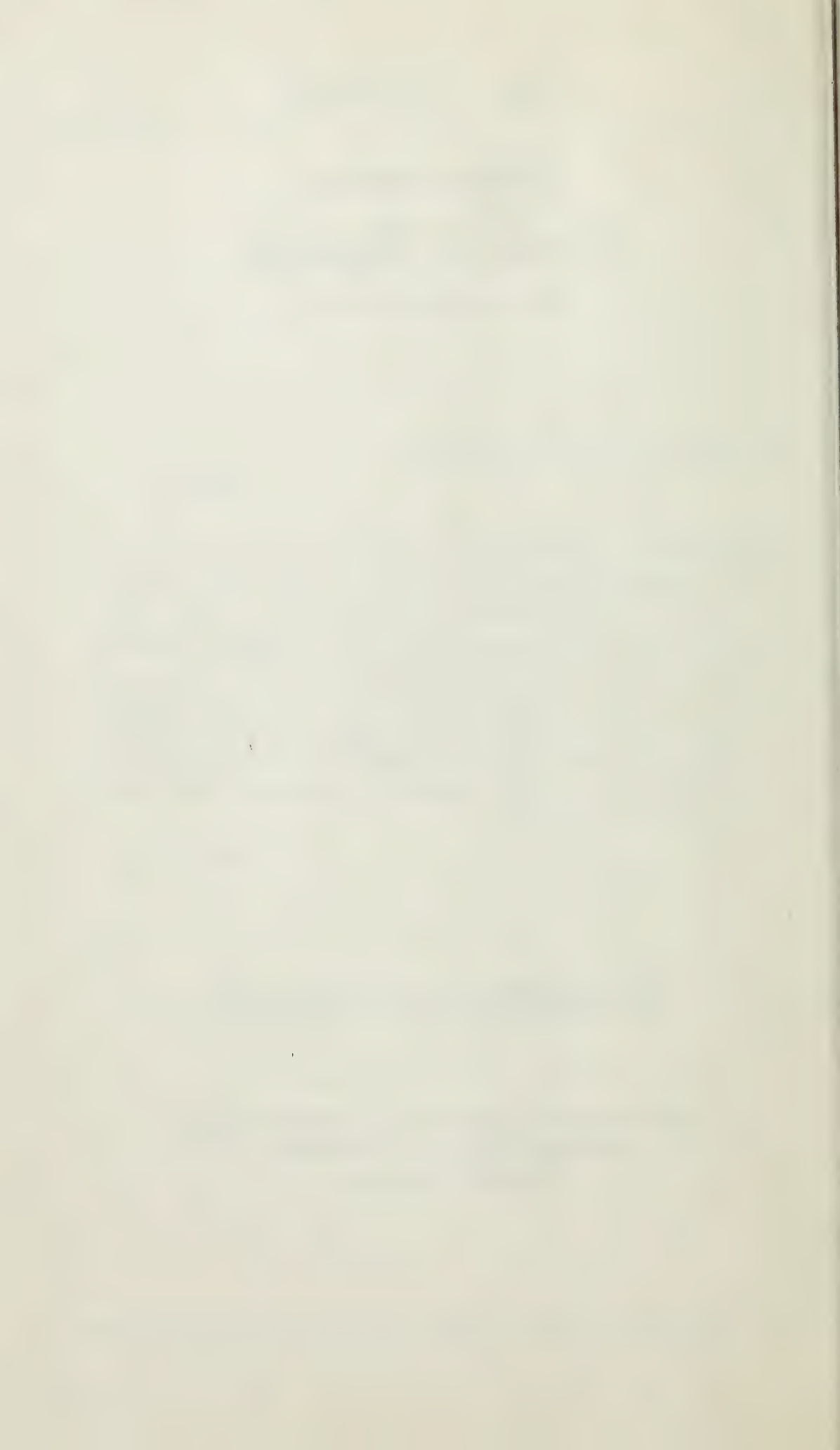
vs.

FLORENCE K. LIVINGSTON, Executrix of the Will of Bronte M. Aikins, deceased (sued herein as B. M. Aikins) FLORENCE K. LIVINGSTON, executrix of the last will of Florence L. Kirchen, deceased, GEORGE B. PARKER, NELLE GRENVILLE PARKER, VERNON S. BATZ (also known as V. S. Batz), EDNA BATZ, D. M. JORDAN, GEORGE HAY CORPORATION, LTD., a corporation, HONOLULU OIL CORPORATION, a corporation, SEABOARD OIL COMPANY OF DELAWARE, a corporation and THE COUNTY OF KERN,

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Appeal from the United States District Court,
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Northern Division.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

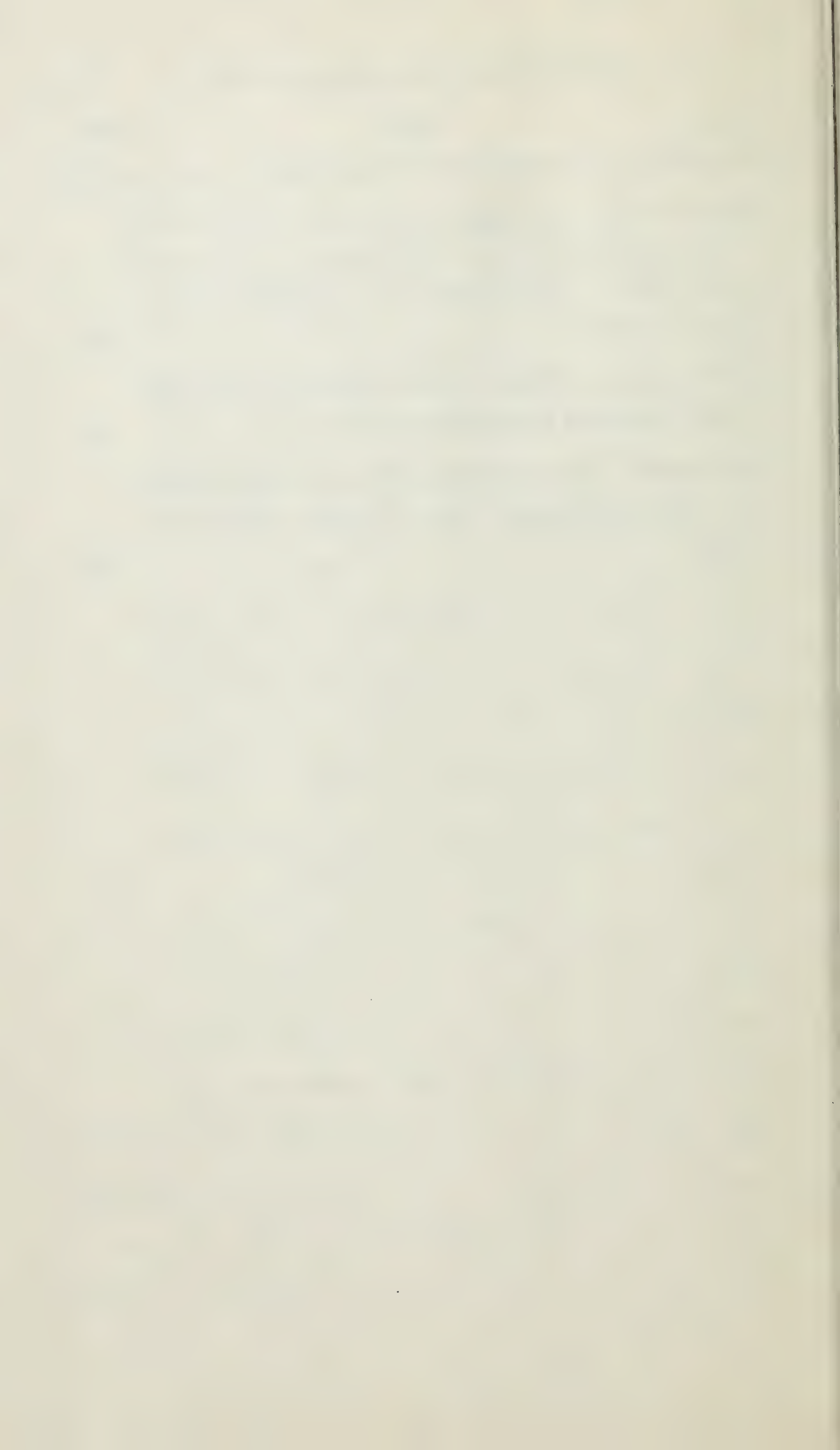
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ARCH H. VERNON,

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Los Angeles 13, Calif.

In the District Court of the United States in and
for the Southern District of California, North-
ern Division.

Civil Action No. 617-ND

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. L. AIKINS, B. M. AIKINS, FLORENCE L.
KIRCHEN, GEORGE B. PARKER, NELLE
GRENVILLE PARKER, VERNON S. BATZ
(also known as V. S. BATZ), EDNA BATZ,
D. M. JORDAN, GEORGE HAY CORPORA-
TION, LTD., a corporation, HONOLULU OIL
CORPORATION, a corporation, SEABOARD
OIL COMPANY OF DELAWARE, a corpo-
ration, THE COUNTY OF KERN, JOHN
DOE, RICHARD ROE, MARY COE, BLACK
CORPORATION, and WHITE CORPORA-
TION,

Defendants.

COMPLAINT TO REMOVE CLOUDS, TO
QUIET TITLE AND TO ENJOIN TRES-
PASSES ON CERTAIN REAL PROPERTY
IN KERN COUNTY, CALIFORNIA.

Plaintiff, United States of America, by James
M. Carter, United States Attorney for the South-
ern District of California, and Francis B. Critch-
low, Special Assistant to the Attorney General,

acting under the direction of the Attorney General of the United States, brings this suit against the defendants above named and for its cause of action states:

I.

Defendants A. L. Aikins and B. M. Aikins are wife and husband. Defendants George B. Parker and Nelle Grenville Parker are husband and wife. Defendants George B. Parker and Nelle Grenville Parker are husband and wife. Defendants Vernon S. Batz and Edna Batz are husband and wife. Defendants Florence L. Kirchen and D. M. Jordan are widows. Each of the aforesaid defendants is a citizen and resident of the State of California.

II.

Defendant George Hay Corporation, Ltd., is a corporation incorporated under the laws of the State of California with its principal place of business in Kern County, California.

III.

Defendant Honolulu Oil Corporation is a corporation incorporated under the laws of the State of Delaware, authorized to do and doing business in the State of California.

IV.

Defendant Seaboard Oil Company of Delaware is a corporation incorporated under the laws of the State of Delaware, authorized to do and doing business in the State of California.

V.

Defendant County of Kern is a political subdivision of the State of California.

VI.

Plaintiff is ignorant of and unable to ascertain the true names of defendants sued as John Doe, Richard Roe, Mary Coe, Black Corporation and White Corporation and, therefore, brings this action against them by the aforesaid fictitious names and prays that when the true names of said defendants are discovered they be served with process herein and the action thereafter proceed against them by their true names.

VII.

At all times herein material, plaintiff was and now is the owner in fee simple of certain lots, pieces or parcels of land in the County of Kern, State of California, to-wit:

Lots 2 to 11, inclusive, of Section 36, Township 29 South, Range 20 East, M.D.B.M., as the same are described and delineated by that certain Segregation Survey approved by the United States Surveyor General for California on April 7, 1915.

The aforesaid lots, pieces or parcels of land are also sometimes described as being—

that portion of the northeast quarter and the south half of Section thirty-six (36), Township twenty-nine (29) south, Range twenty (20) east, Mount Diablo Meridian, according to the survey thereof

approved November 18, 1893, which lies without the boundaries of Section thirty-six (36), Township twenty-nine (29) south, Range twenty (20) east, Mount Diablo Meridian, according to the survey thereof approved April 27, 1869.

VIII.

Each of the defendants hereinabove named claims some estate, right, title or interest adverse to plaintiff in or to the lands described in paragraph VII hereof or in or to the oil and gas contained therein. Insofar as plaintiff is advised, all of said claims are under and are based upon the facts and circumstances hereinafter stated.

IX.

On April 27, 1869, the United States Surveyor General for California approved a survey theretofore made of Township 29 South, Range 20 East, M.D.B.M., and thereupon, under and by virtue of the Act of Congress approved March 3, 1853 (10 Stat. 244, c 145), title became vested in the State of California to all of the area contained within the boundaries of Section 36 of said Township as the same were defined by said survey, excepting, however, 160 acres thereof which were upon the date of said survey subject to a pre-existing pre-emption claim of one Edwin M. Crocker. Said Section 36 as so surveyed and defined contained 640 acres and, upon the approval of said survey as aforesaid, the State of California assumed ownership, possession and control over all those portions of

said section not subject to said pre-emption claim and, since the approval of said survey, by various conveyances, the said State has sold and conveyed all of said portions containing in the aggregate 480 acres to various grantees who or whose successors in interest have at all subsequent times been and are now in possession thereof. A copy of the plat of said survey of April 27, 1869 is attached hereto, marked "Exhibit A," and made a part hereof.

X.

On January 10, 1870, plaintiff granted by letters patent to the aforesaid Edwin M. Crocker the 160 acre parcel embraced in the pre-emption claim referred to in paragraph IX hereof and thereafter, on or about October 7, 1874, plaintiff, as indemnity to the State of California for its loss of acreage because of the said Crocker pre-emption and at the request and on the selection of said State, granted to said State 160 acres of land in Section 26, Township 29 South, Range 20 East, M.D.B.M., whereupon the State of California assumed ownership, possession and control over said 160 acres in said Section 26 and has since sold and conveyed the same to its grantees who or whose successors in interest have been at all times since and now are in possession thereof.

XI.

In the year 1893, plaintiff, for the purpose of reconciling the boundaries of said Township 29 South, Range 20 East, as described in the aforementioned survey of April 27, 1869, with surveys

made of the adjacent Townships 29 South, Range 21 East, and 30 South, Range 20 East, caused a resurvey to be made of said Township 29 South, Range 20 East, M.D.B.M. The plat of said resurvey was approved by the United States Surveyor General for California on November 18, 1893. The reconciliation effected by said resurvey resulted in placing the east boundary line of said Township 29 South, Range 20 East, somewhat to the east of the east boundary of said Township as described by the survey of April 27, 1869, and in placing the south boundary of said Township somewhat to the south of the south boundary thereof as described by the said survey of April 27, 1869. As a result of the relocation of said township lines all of the exterior boundary lines of the area referred to as Section 36 by said resurvey were placed somewhat to the east and south of the corresponding exterior boundaries of Section 36 of said Township as the same were described and delineated in the survey of April 27, 1869. A copy of the plat of said resurvey of November 18, 1893 is attached hereto, marked "Exhibit B," and made a part hereof.

XII.

In the year 1914, plaintiff, for the purpose of depicting on a plat the position on the ground of Section 36, Township 29 South, Range 20 East, M.D.B.M., and the portions thereof which had theretofore been granted to the State of California and to Edwin M. Crocker, as stated in paragraphs IX and X hereof, as compared with the position on the ground of the area designated as Section 36 in

the resurvey of said Township 29 South, Range 20 East, approved November 18, 1893, caused a segregation survey of the areas involved to be made which said segregation survey and the plat thereof were approved by the United States Surveyor General for California on April 7, 1915. A copy of the plat of said segregation survey, marked "Exhibit C," is attached hereto and made a part hereof.

XIII.

Sometime prior to the month of November, 1915, one Judson H. Jordan made application to the Surveyor General and Register of the State Land Office of the State of California to purchase from said State that portion of the area designated as Section 36, Township 29 South, Range 20 East by the resurvey of November 18, 1893, which lies without the boundaries of Section 36, Township 29 South, Range 20 East, according to the survey approved as hereinbefore stated on April 27, 1869. The said application to purchase was disapproved and denied by said Surveyor General and Register upon the ground that the lands so sought to be purchased belonged to the United States and not to the State of California but, thereafter, on or about the 19th day of November, 1915, the said Surveyor General and Register of the State Land Office, acting under the compulsion of a writ of mandate issued out of the Superior Court of the City and County of San Francisco, caused a pretended deed or patent to be issued in the name of the State of California which said deed or patent

purported to grant and convey to said Judson H. Jordan the lands and premises in this paragraph and in paragraph VII described. Plaintiff herein was not a party to the suit in which said writ was issued.

XIV.

The State of California never has had any estate, right, title, or interest in or to the lands described in the pretended deed or patent issued as aforesaid to said Judson H. Jordan, or in or to any part thereof, and said pretended deed is and at all times has been inoperative and of no lawful force or effect. The defendants and each of them base their claims of right, title or interest in or to the said lands upon various pretended deeds, decrees, leases, agreements and other muniments of title all of which, as plaintiff is informed and believes and upon such information and belief alleges, stem from and are predicated upon the pretended deed or patent issued as aforesaid to said Judson H. Jordan. All of said documents are and at all times have been inoperative and of no lawful force or effect, and yet said documents and each of them and the said pretended deed or patent to said Judson H. Jordan cast clouds upon plaintiff's title to said lands and hinder and interfere with plaintiff's use and enjoyment thereof.

XV.

Each of the defendants named in paragraphs I, II, III and IV hereof have claimed and do claim

the right and have threatened and do threaten to enter upon the premises in paragraph VII described, to drill wells thereon for the production of oil and gas and by means thereof to extract from said lands and dispose of all the oil and gas contained therein, and plaintiff is informed and believes and upon such information and belief alleges that said defendants intend to and unless restrained by order of this court will carry out said threats.

XVI.

The claims of the defendants in and to the lands involved herein and each and every of such claims is without right and none of said defendants have any right, title or interest in or to said lands or any part thereof or in or to the oil or gas contained therein. Plaintiff has no knowledge of any claims that may be made by the defendants or any of them in or to the lands and premises described herein or any part thereof, except as such claims are hereinabove stated in this complaint, and plaintiff calls upon the defendants and each of them to assert any and all such claims as they may have.

Wherefore, plaintiff demands:

1. That it be adjudged and declared that plaintiff is the absolute owner of the public lands described in paragraph VII and each and every part thereof and that none of the defendants have any right, title, interest or estate in or to the same or any part or parcel thereof:

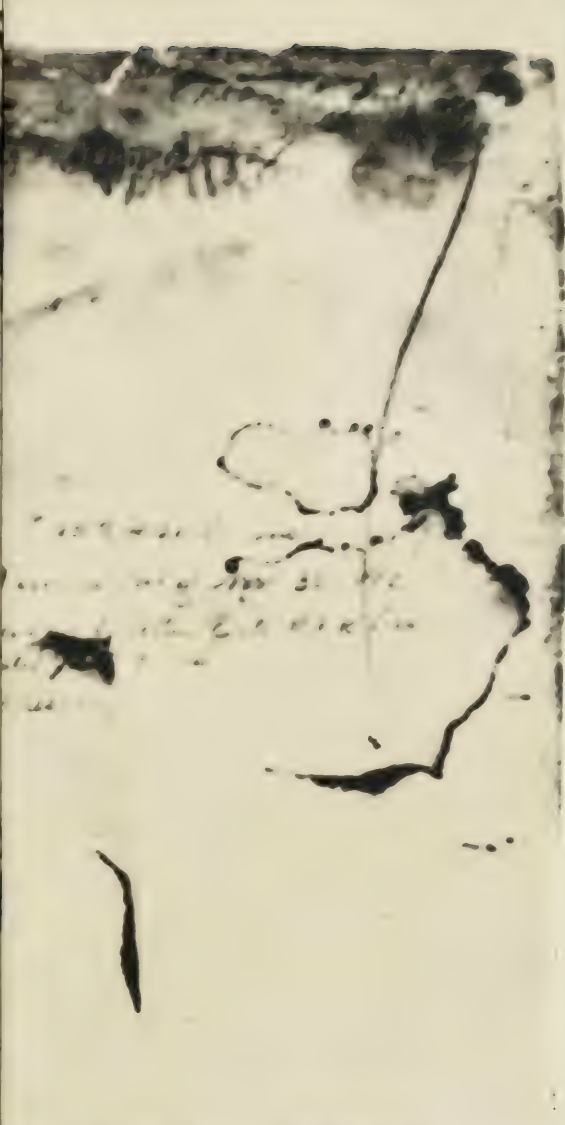
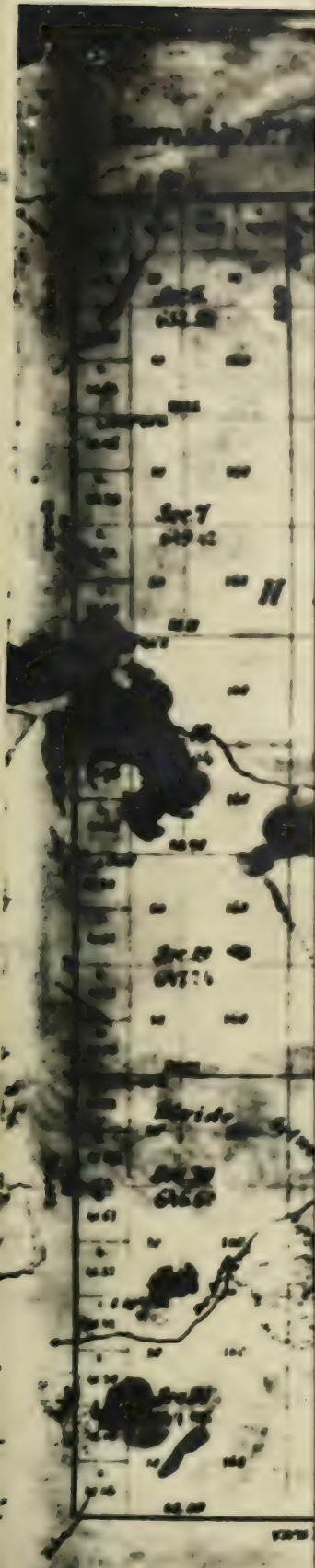
2. That the deed or patent from the State of California to Judson H. Jordan, referred to in paragraphs XIII and XIV and the deeds, decrees, conveyances, transfers, assignments or other muniments of title under, through or by virtue of which the defendants or any of them claim or may claim any estate, right, title or interest in said lands, be adjudged to be null and void in so far as the same purport to convey any right, title, estate or interest in the lands described in paragraph VII or any part thereof, or to the oil or gas contained therein, and that the defendants and each of them be forever enjoined from asserting any claim whatsoever in or to said lands or any part thereof or in or to the oil or gas contained therein adversely to plaintiff;

3. That plaintiff have judgment for its costs and disbursements herein and such other and further relief as may be just.

/s/ JAMES M. CARTER,
United States Attorney.

/s/ FRANCIS B. CRITCHLOW,
Special Assistant to the Attorney General.
Attorneys for Plaintiff
United States of America.



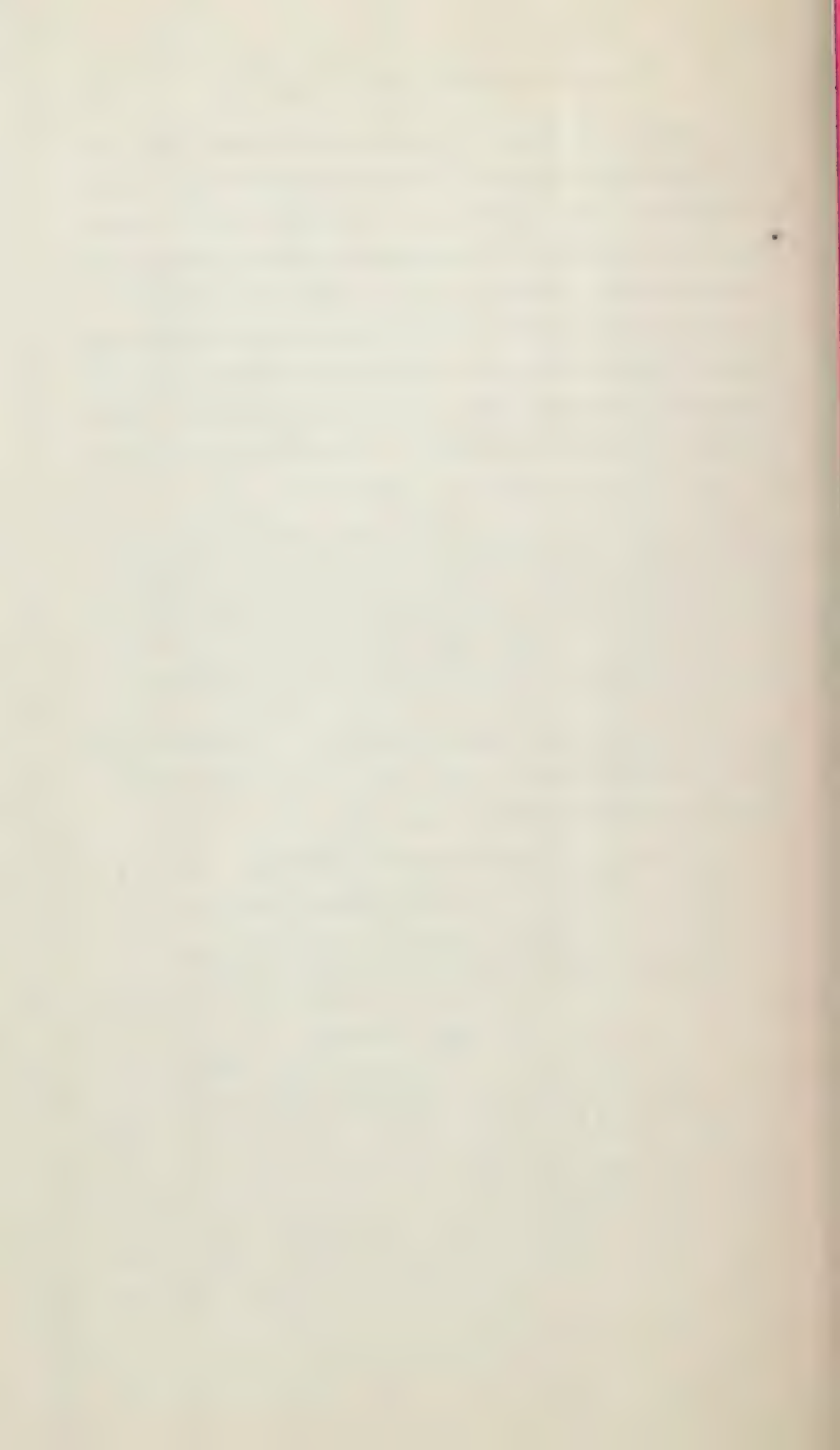


at Public Land 23 061 71 Acres

29 South Range 8 20 East of Mount Smith, Pecos Co. N.M.

Range Designated
Part of land boundary of Township at water
East
West
Township lines colored brown
Section

Thompson
June 2nd 1871





Broad Rubber Land surveyed by N. B. Carpenter 80 Acres
 . . . Lots 37 to 47 inclusive Estimated 8000 00
 Approximate Area of Township 24320 00

All Meridian lines of subdivision are run 30° 47' 30"
 except as otherwise noted

The above Map of Township N° 20 South Range N° 24 East Mount
 Diablo Meridian is strictly conformable to the field notes of the survey
 thereof made in this Office which have been examined and approved.
 U. S. Surveyor General's Office
 San Francisco California.
 November 15. 1893.

Wm. H. Field
 U. S. Survey Gen. Cal.

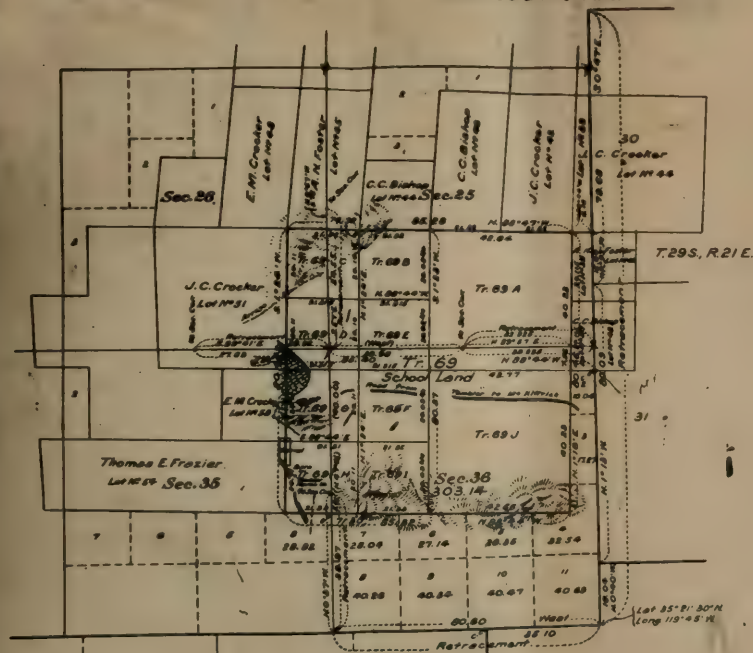
Reuter July 2, 1894
 S. J. L.

Survey Description	By whom Surveyed	Date of Control	Method of Survey	When Surveyed	When Re-Examined
The District of Idaho previously surveyed on 1890 this Township approved April 27 th 1893 July of 94 Survey of July 1894 Survey of July 1894 Survey of July 1894	N. B. Carpenter . . .	December 18 th 1890 . . .	See Map of U. S. N. B. S. T. 20 S. 24 E. T. 20 S. 24 E. T. 20 S. 24 E. T. 20 S. 24 E.	1893 1893 1893 1893



**PLAN
OF THE SEGREGATION SURVEY OF
Tract No 69 as subdivided into Tracts A, B, C, D, E, F, G, H, I and J.
T.29S, R.20E, M.D.M. California.**

Scale: 20 chains 1 inch.



The tract designated herein as 69, represents the original position of School Section 35, T.29S, R.20E, M.D.M. California, as defined on the ground by John Read, U.S. Deputy Surveyor, in 1863, in executing the survey of said township, plat of which was approved by the Surveyor General, April 27, 1868, and shows the relation thereof to the survey executed by H. B. Carpenter, U.S. Deputy Surveyor in 1893, plat of which was approved by the Surveyor General, November 18, 1893.

The tracts designated herein as 69-A, 69-B, 69-C and 69-D represent the position as related to the lines of the survey executed by said H. B. Carpenter in 1893, of the SW 1/4, NW 1/4, SE 1/4, and SW 1/4 of original Sec. 35, T.29S, R.20E, M.D.M. patented to Edwin M. Crocker as a preemption, Entry No. 1878, dated January 10, 1870, said entry being based on the plat of survey executed by said John Read in 1863.

T.30S, R.20E

I hereby certify that the above plat of the resurvey of the boundaries, and the survey of a portion of the subdivisions of Tract No. 69, as subdivided into tracts designated herein as A, B, C, D, E, F, G, H, I and J, T.29S, R.20E, Mount Diablo Meridian California, executed by Lincoln E. Wilkes, U.S. Surveyor, January 13 to January 18, 1915, under his instructions dated September 10, 1912, is strictly conformable to the field notes of the resurvey thereof on file in this office, which have been examined and approved
U.S. Surveyor General's Office,
San Francisco, California,
April 7, 1915.

Frank M. Havel
U.S. Surveyor General
For California

Ex 1611 "C"

[Title of District Court and Cause.]

ANSWER

Answering the complaint of plaintiff, the defendants admit, deny, and allege as follows:

1. Defendants admit the averments contained in paragraphs I, II, III, IV, V, VIII (the first sentence thereof only), IX, X, XII, and XV of the complaint herein; and they deny the averments in the last sentence of paragraph VIII that all of their claims arise exclusively under and are based exclusively upon, or arise exclusively under or are based exclusively upon the facts and circumstances, or the facts or circumstances stated in paragraphs IX and following of the complaint herein.

2. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments, or any of them, contained in paragraph VI of the complaint herein.

3. Defendants deny that at any time or times herein or in the complaint material plaintiff was or now is the owner in fee simple, or otherwise, or at all, of any of the lots, pieces or parcels of land described in paragraph VII of the complaint herein.

4. Defendants deny that the survey of Township 29 South, Range 20 East, M.D.B.M., averred in paragraph XI of the complaint herein to have been made in the year 1893, was a resurvey or was ordered, caused or made for the purpose of recon-

ciling the boundaries of said Township, as described in the survey thereof of April 27, 1869, with surveys made of the adjacent Townships 29 South, Range 21 East, and 30 South, Range 20 East; and in this behalf defendants allege that said survey which is averred to have been made in the year 1893 was a new survey and was ordered, caused and made because surveys made in 1869 and 1871 of said Townships 29 and 30 South, Ranges 20 and 21 East, had been demonstrated to be fraudulent, and in order to obliterate the lines and corners made by the surveyor thereof, one Reed, in said fraudulent surveys.

5. Defendants deny that the deed or patent issued by the State of California, as averred in paragraph XIII of the complaint herein, was a pretended deed or a pretended patent.

6. Defendants, answering paragraph XIV of the complaint herein, deny that the State of California never had any estate, right, title, or interest in or to any part of the lands described in the deed or patent issued to Judson H. Jordan; they deny that said deed or patent has ever been or is inoperative and of no lawful force or effect, or inoperative or of no lawful force or effect; they deny that any of the deeds, decrees, leases, agreements, or muniments of title upon which they base their claims of right, title and interest in and to the said lands, stem from and are predicated upon, or stem from or are predicated upon the deed or patent issued to Judson H. Jordan; they deny that

said deed or patent issued to Judson H. Jordan was or is a pretended deed or patent; and they deny that any of said documents is or ever has been inoperative and of no lawful force or effect, or inoperative or of no lawful force or effect.

7. Defendants deny the averments, and each of them, contained in the first sentence of paragraph XVI of the complaint herein.

For a First Affirmative Defense to the complaint herein, defendants aver:

1. Under date of March 22, 1912, one Judson H. Jordan made application to the Surveyor General and Register of the State Land Office of the State of California to purchase from said state the land described in paragraph VII of the complaint herein.

2. Said application of Judson H. Jordan to purchase said land was disapproved and denied by said Surveyor General and Register upon the chief ground, as expressed in his decision disapproving the same, that the lands sought to be purchased belonged to the United States and not to the State of California; but thereafter and on or about the 19th day of November, 1915, the said Surveyor General and Register of the State Land Office, acting under the compulsion of a writ of mandate issued out of and under the seal of the Superior Court for the City and County of San Francisco, State of California pursuant to a mandate of the District Court

of Appeal, First Appellate District of said state, in Civil Case No. 1347 (25 Cal. App. Rep. 166), decided July 23, 1914, ordering said Surveyor General to approve said Jordan's application to purchase said lands from said State, caused a deed or patent to be issued by the State of California to said Judson H. Jordan which said deed or patent granted and conveyed to said Judson H. Jordan the lands and premises described in said paragraph VII of the complaint herein.

3. The said Judson H. Jordan paid to the State of California the purchase price and all fees and costs required by the laws of the State of California to be paid for said lands.

4. Defendants are informed and believe and therefore allege that at all times from and after March 22, 1912 the plaintiff herein knew of the proceedings taken by said Judson H. Jordan and of the result thereof, and that said plaintiff raised no objection to any of said proceedings until on or about May 2, 1947.

5. The defendants herein, except Honolulu Oil Corporation, Seaboard Oil Company of Delaware, and the County of Kern, and except the defendants sued herein by fictitious names, are the owners in fee of the lands described in paragraph VII of the complaint herein.

6. Since on or about April 3, 1946 the defendants Honolulu Oil Corporation and Seaboard Oil Company of Delaware have been and they now are

lessees under a certain oil and gas lease of the said lands described in paragraph VII of the complaint herein.

Wherefore, defendants pray that plaintiff take nothing by its complaint herein; that their title to the lands described in paragraph VII of the complaint herein be quieted and set at rest against the claims of plaintiff, and in accordance with their respective interests therein; that they recover their costs herein expended; and for such other and further relief as to the Court may seem equitable.

/s/ BRONTE M. AIKINS,

Attorney for Defendants A. L. Aikins and B. M. Aikins.

/s/ PHILIP M. WAGY,

Attorney for Defendants George Hay Corporation, Ltd., George B. Parker, Nelle Grenville Parker, Vernon S. Batz, Edna Batz, D. M. Jordan.

/s/ PATRICIA LANE,

Attorney for Defendant Florence K. Livingston, as Executrix of the Last Will of Florence L. Kirchen, deceased.

/s/ A. W. MITCHEM.

/s/ ARCH H. VERNON,

/s/ HERBERT W. CLARK,

Attorneys for Defendants Honolulu Oil Corporation and Seaboard Oil Company of Delaware.

Affidavit of Service by mail attached.

[Endorsed]: Filed June 30, 1947.

[Title of District Court and Cause.]

DISCLAIMER

Now comes the defendant, County of Kern, a political subdivision of the State of California, and alleges as follows:

I.

The defendant County of Kern disclaims any interest or claim in or to the lands described in paragraph VII of said Complaint, or in and to the oil and gas contained in said lands.

Wherefore, this defendant prays that it may go hence without judgment of any costs or disbursements being assessed against it.

/s/ NORBERT BAUMGARTEN,

Norbert Baumgarten, County Counsel, Attorney for
Defendant, County of Kern.

Service of Copy acknowledged.

[Endorsed]: Filed June 30, 1947.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Comes now the plaintiff, United States of America, and amends paragraph X of its complaint herein to read as follows:

“On January 10, 1870, plaintiff granted by letters patent to the aforesaid Edwin M. Crocker the 160 acre parcel embraced in the pre-emption claim referred to in paragraph IX hereof and thereafter, on or about October 7, 1874, plaintiff, as indemnity to the State of California for its loss of acreage because of the said Crocker pre-emption and at the request and on the selection of said State, granted to said State 160 acres of land in Sections 26 and 35, Township 29 South, Range 20 East, M.D.B.M., as defined by said survey approved April 27, 1869, whereupon the State of California assumed ownership, possession and control over said 160 acres in said Sections 26 and 35, and has since sold and conveyed the same to its grantees who or whose successors in interest have been at all times since and now are in possession thereof.”

/s/ JAMES M. CARTER,
U. S. Attorney.

/s/ FRANCIS B. CRITCHLOW,
Special Assistant to the
Attorney General,
Attorneys for Plaintiff United States of America.

Copy of the foregoing amendment received and consent given to the filing thereof as of this 23rd day of July, 1947.

/s/ BRONTE M. AIKINS,
Attorney for Defendants A. L. Aikins and B. M. Aikins.

/s/ PHILIP M. WAGY,
Attorney for Defendants George Hay Corporation, Ltd., George B. Parker, Nelle Grenville Parker, Vernon S. Batz, Edna Batz, D. M. Jordan.

/s/ PATRICIA LANE,
Attorney for Defendant Florence K. Livingston, as Executrix of the Last Will of Florence L. Kirchen, deceased.

/s/ A. W. MITCHEM,

/s/ ARCH H. VERNON,

/s/ HERBERT W. CLARK,
Attorneys for Defendants Honolulu Oil Corporation and Seaboard Oil Company of Delaware.

Filing of foregoing amendment is permitted Aug. 11, 1947.

/s/ C. E. BEAUMONT,
Judge.

[Endorsed]: Filed August 11, 1947.

[Title of District Court and Cause.]

AMENDED ANSWER TO AMENDED
COMPLAINT

Answering the amended complaint of plaintiff, the defendants admit, deny, and allege as follows:

1. Defendants admit the averments contained in paragraphs I, II, III, IV, V, VIII (the first sentence thereof only), X, XII, and XV of the amended complaint herein; and they deny the averments in the last sentence of paragraph VIII that all of their claims arise exclusively under and are based exclusively upon, or arise exclusively under or are based exclusively upon the facts and circumstances, or the facts or circumstances stated in paragraph IX and following of the amended complaint herein.

2. Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments, or any of them, contained in paragraph VI of the amended complaint herein.

3. Defendants deny that at any time or times herein or in the amended complaint material plaintiff was or now is the owner in fee simple, or otherwise, or at all, of any of the lots, pieces or parcels of land described in paragraph VII of the amended complaint herein.

4. Defendants, answering the averments in paragraph IX of the amended complaint, admit the

approval on April 27, 1869 by the United States Surveyor General for California of a survey alleged to have been theretofore made of Township 29 South, Range 20 East, M.D.B.M., and they are informed and believe and therefore allege that the said alleged survey was, upon examination made shortly prior to December 28, 1892, demonstrated to be fraudulent and the lines and corners thereof were directed to be and they were obliterated; they are without knowledge or information sufficient to form a belief as to the truth of the averments that said Section 36 as so surveyed and defined contained 640 or any acres, or that since the approval of said alleged survey the said State has sold and conveyed portions thereof containing in the aggregate 480 or any acres.

5. Defendants deny that the deed or patent issued by the State of California, as averred in paragraph XIII of the amended complaint herein, was a pretended deed or a pretended patent.

6. Defendants, answering paragraph XIV of the amended complaint herein, deny that the State of California never had any estate, right, title, or interest in or to any part of the lands described in the deed or patent issued to Judson H. Jordan; they deny that said deed or patent has ever been or is inoperative and of no lawful force or effect, or inoperative or of no lawful force or effect; they deny that any of the deeds, decrees, leases, agree-

ments, or muniments of title upon which they base their claims of right, title and interest in and to the said lands, stem from and are predicated upon, or stem from or are predicated upon the deed or patent issued to Judson H. Jordan; they deny that said deed or patent issued to Judson H. Jordan was or is a pretended deed or patent; and they deny that any of said documents is or ever has been inoperative and of no lawful force or effect, or inoperative or of no lawful force or effect.

7. Defendants deny the averments, and each of them, contained in the first sentence of paragraph XVI of the amended complaint herein.

For a First Affirmative Defense to the amended complaint therein, defendants aver:

1. Under date of March 22, 1912, one Judson H. Jordan made application to the Survey General and Register of the State Land Office of the State of California to purchase from said state the land described in paragraph VII of the amended complaint herein.

2. Said application of Judson H. Jordan to purchase said land was disapproved and denied by said Surveyor General and Register upon the chief ground, as expressed in his decision disapproving the same, that the lands sought to be purchased belonged to the United States and not to the State of California; but thereafter and on or about the 19th day of November, 1915, the said Surveyor Gen-

eral and Register of the State Land Office, acting under the compulsion of a writ of mandate issued out of and under the seal of the Superior Court for the City and County of San Francisco, State of California pursuant to a mandate of the District Court of Appeal, First Appellate District of said state, in Civil Case No. 1347 (25 Cal. App. Rep. 166), decided July 23, 1914, ordering said Surveyor General to approve said Jordan's application to purchase said lands from said State, caused a deed or patent to be issued by the State of California to said Judson H. Jordan which said deed or patent granted and conveyed to said Judson H. Jordan the lands and premises described in said paragraph VII of the amended complaint herein.

3. The said Judson H. Jordan paid to the State of California the purchase price and all fees and costs required by the laws of the State of California to be paid for said lands, and has paid all taxes levied and assessed upon the same.

4. Defendants are informed and believe and therefore allege that at all times from and after March 22, 1912 the plaintiff herein knew of the proceedings taken by said Judson H. Jordan and of the result thereof, and that said plaintiff raised no objection to any of said proceedings and made no claim to the said lands or any thereof until subsequent to May 2, 1947.

5. The defendants herein, except Honolulu Oil

Corporation, Seaboard Oil Company of Delaware, and the County of Kern, and except the defendants sued herein by fictitious names, are the owners in fee of the lands described in paragraph VII of the amended complaint herein.

6. Since on or about April 3, 1946 the defendants Honolulu Oil Corporation and Seaboard Oil Company of Delaware have been and they now are lessees under a certain oil and gas lease of the said lands described in paragraph VII of the amended complaint herein.

Wherefore, defendants pray that plaintiff take nothing by its amended complaint herein; that their title to the lands described in paragraph VII of the amended complaint herein be quieted and set at rest against the claims of plaintiff, and in accordance with their respective interests therein; that they recover their costs herein expended; and for such other and further relief as to the Court may seem equitable.

/s/ BRONTE M. AIKINS,

Attorney for Defendants A. L. Aikins and B. M. Aikins.

/s/ PHILIP M. WAGY,

Attorney for Defendants George Hay Corporation, Ltd., George B. Parker, Nelle Grenville Parker, Vernon S. Batz, Edna Batz, D. M. Jordan.

/s/ PATRICIA LANE,

Attorney for Defendant Florence K. Livingston, as Executrix of the Last Will of Florence L. Kirchen, deceased.

/s/ A. W. MITCHEM,

/s/ ARCH H. VERNON,

/s/ HERBERT W. CLARK,

Attorneys for Defendants Honolulu Oil Corporation
and Seaboard Oil Company of Delaware.

Affidavit of Service by mail attached.

[Endorsed]: Filed August 10, 1947.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Peirson M. Hall, Judge.

An original government survey by one Reed in 1869 of Township 29 South, Range 20 East, M. D. B. & M., showed Section 36 therein to contain 640 acres of land. In 1892 a re-survey of the entire township was ordered by the Government and made by one Carpenter, which re-survey was approved in 1894. In the meanwhile, the State of California had sold and issued patents, as school land, to all of the land which had been included in Section 36 of the Reed survey. By the Carpenter re-survey the southerly and easterly boundaries of the township were shifted south and east, and all the boundaries of the land designated as Section 36 in the Reed survey were shifted southward and eastward. The result of such shift was to show Section 36 on the

Carpenter survey to include only a portion of the lands previously included in Reed's Section 36, and also to include in Carpenter's Section 36 additional lands not theretofore designated on any survey as being in any Section 36, or even being within the township above mentioned.¹ The latter land was conveyed to Judson H. Jordan by the State of California as school land on December 1, 1914, pursuant to a mandate of the California Courts, issued as a result of *Jordan v. Kingsbury*, 25 Cal. App. 166 (1912). It is the land so transferred to Jordan to which the Government now seeks to quiet title as against the defendants who are the successors in interest of Jordan, who was the successor in interest of the State of California.

Not much can be added to what was said in *Jordan v. Kingsbury*, 25 Cal. App., 166, as to the passage of title from the United States to the State of California to the land involved here, which case concerned the identical property, identical surveys and identical chain of title as is involved in this case.

¹Carpenter's survey of Section 36 included about 330 acres of land which had been included by Reed in his previous survey of Section 36. The remainder of Reed's Section 36 was shown by Carpenter to be in what Carpenter designated as lying in Sections 25, 26 and 35. The total acreage shown by Carpenter to lie within the exterior boundaries of his Section 36 was 634.63.

A subsequent "segregation" survey by Wilkes in 1915 confirmed the boundaries of Section 36 as shown by Carpenter.

The fact that the United States was not a party to that suit does not alter the reason and logic supporting the conclusions of the court therein. This is particularly so in view of the fact that the court in that case, of necessity, had to construe the very statutes and surveys involved here, and moreover based its conclusions on the United States Supreme Court cases there cited, *Cragin v. Powell*, 128 U. S. 691, *Hardin v. Jordan*, 140 U. S. 371, *Gleason v. White* 199 U. S. 54, and particularly *Knight v. U. S. Land Association*, 142 U. S. 161, involving a re-survey, which the court held to be binding on the courts if the Department of the Interior then had jurisdiction and power to order and to make the re-survey.

Neither of the parties here is questioning the right or power of the Government to have made the Carpenter re-survey in 1893.

While the special defense raised in defendant's answer may be construed to be a plea in estoppel, the parties have not argued that point in the copious and excellent briefs filed.

Rather, the defendants have chosen to stand on the position that the Granting Act of 1853 (10 Stats. 244) construed in connection with the Survey Acts (43 U. S. C. A. 751 et seq.) and the Lieu Lands Act (43 U. S. C. 851, 852) clearly granted to the State of California at least two Sections of land of 640 acres each in each township, and also granted more than that amount if the surveys as actually

made by the Government showed the total acreage of either Sections 16 or 36 to exceed 640 acres, and that this is so whether such excess acreage is shown on an "original" survey, or by a "corrective" survey, or on a "re-survey."

The Government's position may be stated thusly: it concedes that under the Granting Act, the Survey Acts, and the Lieu Land Acts (*supra*) the State is entitled to 640 acres in, or in lieu of, each Section 16 and 36 in each township; it further concedes that if either or both Sections 16 and 36 contain more than 640 acres as shown by an original survey, such excess acreage vests in the State; but contends that if such original survey shows a total of 640 acres in either section, (Section 36 in this instance), the grant to the State is exhausted as to that section, even though on a re-survey such Section 36 is relocated so as to exclude a portion of the original Section 36 and include in the designated Section 36 of the re-survey, land not included in the original survey of Section 36. The government's contention boils down to this; that the State can and does under the Granting, Survey and Lieu Lands Acts, get any excess of 640 acres shown in a school section by an original survey, but that said Acts do not operate to grant such excess in event of a re-survey.

The land covered by the 1869 Reed Survey having passed to the State of California upon the approval of such survey, *U. S. v. Morrison*, 240 U. S. 192

and cases there cited, and having been sold and disposed of by the State prior to the Carpenter re-survey, as approved in 1894, could not be affected by such re-survey, as private rights had in the meanwhile intervened. The Reed Survey, even though declared "fraudulent" and "worthless" as a basis for disposal of the lands in the township, was sufficient to pass title to those depending on it. *Cragin v. Powell*, 128 U. S. 691; *U. S. v. State Investment Company*, 264 U. S. 206, and cases there cited.

It should be noted at this point that no charge or suggestion of fraud or misdealing is involved in this case, and that the record shows complete arms-length dealing between the Government and all parties concerned. It should also be noted that there is no charge or suggestion that the lands in question were known to be mineral in character, or of a class otherwise unavailable to the State at the time of the claimed passage of title to the State of California, in 1894.

The Granting Act of 1853 (10 Stats. 244, Sec. 6) did not put the terms of the grant in acres of land. It did not grant a maximum of 1280 acres of land in each township. It did not grant 640 acres in each Section 16 and in each Section 36. It did grant to the State of California for public school purposes Sections 16 and 36 in each township, without any mention of the number of acres. This is true also as to the Acts examined which granted lands to other states. None of them mentioned acreage; each

of them grants Sections. (In some instances other numbered Sections are granted.)

The Granting Act was passed before the public lands were surveyed. The grant therein contained did not become effective until the lands were identified by actual survey. *U. S. v. Morrison*, 240 U. S. 192. What was to be Sections 16 and 36 had thereafter to be determined. This was done by that department of the Government charged with the duty of making surveys and the administration of the public land laws. The Government at all times had control of the making and returning of the surveys. Thus, what constituted Sections 16 and 36 in (1) numbers of acres and (2) where they were to be located on the surface of the ground, were to be determined by the Government under the previously enacted Survey Statutes. These Statutes have been on the books many years and are now found in Sec. 751 et seq., of Title 43 U. S. C. A. They are derived from the Acts of May 18, 1796, (1 Stats. 464) and the Act of May 10th, 1800 (2 Stats. 73). The first paragraph of Section 751 provides for townships of six miles square; the third paragraph provides that "The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each * * *"; the fifth paragraph provides that where a township may be more or less than six miles square, "the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of

sections or half sections in such townships, according as the error may be in running the lines from east to west, or from north to south.”²

In any event, the requirements of the fifth paragraph of Section 751, have not been generally followed. It is a matter of common knowledge, that many townships in California have excesses on the easterly and southerly tiers of sections. Attached to the defendants’ brief is a list of Sections 16 and 36, totaling 145 Sections, in the State of California which have been surveyed and granted to the State as school lands, each of which exceeds 640 acres; 32

²Upon examination of the Act of May 10th, 1800 (*supra.*) it is noted that the accomodation for excesses or deficiencies to be placed on the western or northern ranges of Sections in each township was according as the error may be in running the lines from east to west or “from south to north.” If the lines were so run on the ground the natural tendency of error in surveys would result in the excesses or deficiencies in Sections being on the north and west tiers of Sections in each township. But the Statute as it now stands and as it stood on the date of the surveys in question provided for the accomodation of errors as the lines were run “from north to south.” If the lines were run on the ground from north to south, the natural tendency of error would be to place the excess or deficiency on the southern tier of sections instead of the northern tier. An examination of the Statute failed to disclose just when this change in wording was made.

The Act of May 18, 1896 (1 Stats. 465) provided that fractional Sections in a township should be “annexed to, and sold with, the adjacent entire sections.”

were Sections 16, located in the middle tier of Sections. One Section 36 contained 1716.70 acres, not only on the original survey approved in 1866, but on the re-survey for subdivisional purposes approved in 1875 (Ex. A-1 and A-2 to plaintiff's brief). Six of the Sections contained over 1,000 acres. And it is admitted by the plaintiff that the statute has not been followed.

But the plaintiff contends that such Sections were all granted to the State of California, and their size not challenged by the Government, because they were indicated to be that size on the original surveys, and not on a re-survey. The effect of this contention is that the Granting Act applied only to original surveys and not to re-surveys. I cannot read the Granting Act, the Survey Acts and the Lieu Land Acts to mean that when the Government designates land as being within Section 36 on a re-survey, such land should not pass to the State any more than I can read such a construction of those Acts as to an original survey. There is certainly nothing in the language of any statute called to my attention, or which on independent research I have been able to find, which says so, or which would warrant such a construction. If under the Granting Act, the Survey Acts and the Lieu Land Acts the State of California was to be limited to 640 acres in, or in lieu of, each Section 16 and 36 and no more, then the Government had no right at any time to grant more than 640 acres in any Section

of any township, whether on original survey or re-survey, and the excesses in each of the 145 Sections above mentioned would be void.

No matter how the plaintiff's contentions are approached or viewed, they come down to this; that the Survey Acts of 1796 and 1800 (43 U. S. C. 751 et seq.) limited the total acreage of all Sections 16 and 36 to 640 acres, by virtue of the provisions therein that all Sections should contain 640 acres "as near as may be," and that excesses or deficiencies should be added to or deducted from the northern and Western ranges or tiers of Sections in each township. If that position is correct, I cannot see how any school section originally surveyed as containing more than 640 acres in California, or the other public land states can rest on a secure title. If that contention is correct, then the excesses of 640 acres of land in each original survey of school Sections are equally as void as under re-surveys of those Sections. And this would be so of all the vast areas in the public land states, as the Survey Statutes have been in force since the formation of the country.

Without question the Government at all times involved here, had the power to make surveys, to correct surveys, and to make re-surveys. *Cragin v. Powell*, 128 U. S. 691; *Knight v. U. S. Land Association*, 142 U. S. 161, 176. The Government therefore had the power to make and approve the Reed survey in 1869. By the same token it had the power to declare that the Reed survey was "fictitious"

“fraudulent,” “grossly erroneous and worthless as a basis for the disposal of the lands,”³ in said township and to conclude and order that “the only proper remedy is a complete re-survey of the township,” and to order that all “lines and corners” made by Reed be “obliterated,” and, pursuant to such conclusion, to order the Carpenter re-survey of the entire township 29 South, Range 20 East, M. D. B. & M., both as to “exterior lines” of the township and as to the “entire subdivisional survey” (Exhibits 8 and 9). This conclusion was reached on November 29th, 1892. Carpenter was authorized to make the survey on December 28th, 1892. His survey of the entire township was approved on November 18th, 1893, and accepted by the Commissioner of the General Land Office on January 31, 1894.⁴

If, as contended by the Government, all Sections should contain 640 acres, as near as may be, and all excesses or deficiencies should be added to the northern or western tier of sections, then on the re-survey, it would have been a simple matter for

³As heretofore indicated such findings could not affect intervening rights depending on such survey. *Cragin v. Powell*, supra.; *Knight v. U. S. Land Assn.*, supra.; *U. S. v. Morrison*, supra.; *U. S. v. State Investment Co.*, supra.

⁴New survey superseded Reed survey and became the official survey. *Gleason v. White*, 199 U. S. 54, 60; *Cox v. Hart*, 260 U. S. 427; *In re Scott*, 172 Cal. 363.

the Government to have adhered to Reed's South and East lines of the township and added the overage to the township south of Township 29, and to the township east of Range 20. The land included in Carpenter's re-survey of the Township, which was not included in Reed's survey, was not in any township until Carpenter put it there. The land in question here would thus have fallen into the northerly tier of Sections in Township 30 South, Range 20 East, and into the westerly tier of Sections in Township 29 South, Range 21 East. As indicated, the Government had unquestioned control of the surveys, and instead of adding the additional or "wild" land to the adjacent northern tier of the next township south, or the adjacent western tier of the next Township East, chose to designate the land involved here as being a Section 36. By such designation the Government confirmed the grant to the State of California, as school lands, of the lands designated as Section 36 in the Carpenter re-survey which had not been included in the previous Reed survey. And upon the approval of the Carpenter re-survey the title to such additional land designated as Section 36 therein, immediately passed to the State of California. This conclusion would seem to be inescapable in view of the language of the Acts of Congress involved, and the authority of the cases decided by the Supreme Court, the earliest of which is *Cooper v. Roberts*, 18 How. 173. Others are reviewed and commented on by Mr. Justice Hughes in *U. S. v. Morrison*, 240 U. S. 192.

At page 207 of that case, a previous Land Office Decision of December 6th, 1887 (6 L. D. 412, 417) is quoted with approval as follows: "That the school land grant 'does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor.' " There is no question but that the land in question was in "a condition to pass" to the State, i.e., it was not known mineral land; it was not an Indian, Military, or other reservation; and it was not withdrawn or otherwise disposed of by the United States at the time of or prior to the approval of the Carpenter Survey.

As heretofore indicated, the Government has the power to make surveys and re-surveys, but it cannot by a re-survey or corrective survey deprive anyone of title who has received it in dependence upon the previous survey, *Cragin v. Powell*, supra, *U. S. v. State Investment Co.*, supra.⁵ Under the authority of those cases, the Government could not now, or on the date of filing the instant suit, have deprived the State, or its successors, of title by making a re-survey of the lands in question, and designating them as other than being within the boundaries of Section 36, or throwing them into the northern and western tiers of the next township

⁵See also *Churchill v. Beall*, 99 Cal. App. 482, 490.

southerly and easterly. That would, however, be the effect of conceding that their contention is correct. It would permit the Government to do in this action what it cannot do by a legally made re-survey.

The Government recognizes that intervening rights vest under erroneous or invalid surveys, and that changed or corrected surveys cannot affect such rights. It is doing so in this case, as to the lands in Reed's Section 36, which were put by Carpenter in Sections 25, 26, and 35. The thing which vested the title in the State to those lands was the approval of the Government of Reed's Survey, which showed them to be in his Section 36. *Cooper v. Roberts, et al, supra*. It follows just as logically that the lands in question vested in the State when Carpenter put them in Section 36 by his re-survey, and by the approval of that re-survey. If the Government has any right now to quiet title granted to the State for the lands in suit, which are now in Section 36, it has just as much right to quiet the title to the lands not now in Section 36, but which Reed put in his Section 36. But the Government, as indicated, concedes it cannot do this, because the title vested in the State on the approval of Reed's survey putting them in Section 36 and private rights have intervened. By the same token it cannot quiet title to the lands in question which were legally put in Sections 36, fifty five years ago, and are now in Section 36 and upon which intervening rights have attached to the State of California by the approval of the re-survey in 1894, and to its successors by

the deed from the State to Jordan as school lands thirty four years ago.

The plaintiff's contention that the School Land Grants are on the same footing as Railroad Land Grants does not seem to me to be well taken. There can be no doubt that Railroad grants being private grants, must be strictly construed. *Leavenworth, etc., v. U. S.* 92 U. S. 733; *U. S. v. Oregon, etc.*, 164 U. S. 526 and cases there cited. But from the cases a different rule is applied as to school land grants to the States. In *Cooper v. Roberts*, 18 How. 173, the court referred to the grant as a "compact" between the State of Michigan and the United States. In *United States v. Morrison*, *supra*, the court had under consideration the school land grant to Nevada, and held (page 205) that it was the intention that all school land grants to the different states should be considered on the same footing.⁶ If that is so, then such grants are not a grant from the sovereign Government, to a subject citizen, but are grants from one sovereign, the United States, to another sovereign, the State, for public, and not private purposes of profit as in the railroad grants, and are not subject to such narrow construction.

The plaintiff makes one other contention: that the practice of the Land Office has been to limit the State to 640 acres on re-surveys of Sections 16 and 36, and that hence such departmental construction must be followed by the courts. There are three

⁶To the same effect is *Hydenfeldt v. Daney, etc.*, 93 U. S. 634, 638.

reasons why this contention cannot prevail; first, the Land Office has not been consistent in such respect as evidenced by Exhibit F-3, attached to plaintiff's brief: second, the language of the Statute is plain and unambiguous, (this appears to be the first case of record where an attempt has been made by the Government to quiet title on a survey of excess school sections, and some weight should be given to that fact) and where this is so, the departmental action must yield to the language of the Statute, *Houghton v. Payne* 194 U. S. 88: and third, there is no evidence that the State or those claiming under it, contested the limitation of acreage on re-surveys in the instances cited by the plaintiff, or asserted any right to such excess acreage. Surely the State can waive any excess acreage. Here, it did not and does not.

Judgment will be for the defendant, who will prepare Findings of Fact and Conclusions of Law, unless the parties agree that this Memorandum will serve as such Findings and Conclusions under Federal Rules of Civil Procedure 52a.

Los Angeles, California, May 20th, 1949.

[Endorsed]: Filed May 20, 1949.

In the District Court of the United States in and
for the Southern District of California, North-
ern Division

No. 617-ND—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. L. AIKINS, B. M. AIKINS, FLORENCE L.
KIRCHEN, GEORGE B. PARKER, NELLE
GRENVILLE PARKER, VERNON S. BATZ
(Also Known as V. S. BATZ), EDNA BATZ,
D. M. JORDAN, GEORGE HAY CORPO-
RATION, LTD., a Corporation, HONOLULU
OIL CORPORATION, a Corporation, SEA-
BOARD OIL COMPANY OF DELAWARE,
a Corporation, THE COUNTY OF KERN,
JOHN DOE, RICHARD ROE, MARY COE,
BLACK CORPORATION, and WHITE
CORPORATION,

Defendants.

JUDGMENT FOR DEFENDANTS

This cause having been tried and submitted to
this Court, and the Court having heard and con-
sidered all the evidence adduced and being now
fully informed and advised in the premises and
having made and filed in this cause its memoran-
dum of decision dated May 20, 1949, in which its
findings of fact and conclusions of law appear, and

counsel for the respective parties having agreed that the Court's findings of fact and conclusions of law do appear in said memorandum of decision, it is now by the Court

Considered, Ordered and Adjudged that the plaintiff, United States of America, has not now and, since January 31, 1894, has not had any right, title or interest of any kind or character whatsoever in or to the whole or any part of the portion or parcel of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, Mount Diablo Base Meridian, in the County of Kern, State of California, which is described in plaintiff's complaint herein as

Lots Two (2) to Eleven (11) of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, Mount Diablo Base Meridian, as the same are described and delineated by that certain Segregation Survey approved by the United States Surveyor General for California on April 7, 1915,

and in the Certificate of Purchase issued by the State Land Office of the State of California on December 1, 1914, to one Judson H. Jordan, as

That portion of the Northeast Quarter ($NE\frac{1}{4}$) and the South Half ($S\frac{1}{2}$) of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. M., according to the survey thereof approved November 18, 1893, which lies without the boundaries of Section Thirty-six (36), Township Twenty-nine (29) South, Range

Twenty (20) East, M. D. M., according to the survey thereof approved April 27, 1869; that plaintiff, the United States of America, has not now and, since January 31, 1894, has not had any right, title or interest of any kind or character in or to the oil or gas contained in the said described portions and parts of land or in any thereof; that neither the deed or patent from the State of California to Judson H. Jordan, referred to in paragraphs XIII and XIV of the complaint in this action, nor any of the deeds, decrees, conveyances, transfers, assignments or other muniments of title under, through or by virtue of which any of the defendants in this action claim any estate, right, title or interest in the land hereinabove described or to the oil or gas contained therein, is null or void as against the United States of America, and that each thereof, as well as the deed or patent from the State of California to Judson H. Jordan which is referred to in paragraphs XIII and XIV of the complaint in this action, is valid against any and all claims and objections made in this action by the United States of America with respect thereto.

Done this 22nd day of August, 1949.

/s/ PEIRSON M. HALL,

Judge, U. S. District Court.

The form of the foregoing judgment is approved.

/s/ FRANCIS B. CRITCHLOW,

Special Assistant to the Attorney General and Attorney for Plaintiff.

[Endorsed]: Filed and entered Aug. 22, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendants Above Named and to Messrs.
Bronte M. Aikins, Philip M. Wagye, Patricia
Lane, A. W. Mitchem, Arch H. Vernon and
Herbert W. Clark, Their Attorneys:

Notice is hereby given that the United States of
America, plaintiff above named, hereby appeals to
United States Court of Appeals for the Ninth
Circuit from the final judgment entered in this
action on August 22, 1949.

/s/ JAMES M. CARTER,
United States Attorney.

/s/ FRANCIS B. CRITCHLOW,
Special Assistant to the Attorney General, Attor-
neys for Plaintiff, United States of America.

[Endorsed]: Filed October 20, 1949.

[Title of District Court and Cause.]

STATEMENT OF POINTS UNDER RULE 75(D) FEDERAL RULES OF CIVIL PRO- CEDURE

On appeal in this case, appellant, United States
of America, intends to rely on the following points:

1. That portion of the Northeast Quarter
(NE $\frac{1}{4}$) and the South Half (S $\frac{1}{2}$) of Section
Thirty-six (36), Township Twenty-nine (29) South,

Range Twenty (20) East, M. B. M., according to the survey thereof approved November 18, 1893, which lies without the boundaries of Section Thirty-six (36), said township and range, according to the survey approved April 27, 1869, never became the property of the State of California under its school land grant, and the District Court erred in holding otherwise.

2. The District Court erred in holding that the United States of America has not now and, since January 31, 1894, has not had any right, title or interest in or to the whole or any part of the lands described in the preceding paragraph.

/s/ ERNEST A. TOLIN,
U. S. Attorney.

/s/ FRANCIS B. CRITCHLOW,
Special Assistant to the Attorney General, Attorneys for Plaintiff, United States of America.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Defendants Above Named and to Messrs.
Bronte M. Aikins, Philip M. Wagy, Patricia
Lane, A. W. Mitchem, Arch H. Vernon and
Herbert W. Clark, Their Attorneys:

The United States of America, appellant herein,
hereby designates for its record on appeal the com-
plete record and all the proceedings and evidence
in this case, including the following:

1. Complaint filed May 2, 1947.
2. Answer filed June 30, 1947.
3. Disclaimer of County of Kern filed June 30,
1947.
4. Amendment to complaint filed August 11,
1947.
5. Amended answer to amended complaint filed
August 11, 1947.
6. Stipulation and order substituting Bronte M.
Aikins, as executor of last will of A. L. Aikins, de-
ceased, in place of defendant A. L. Aikins, filed
April 22, 1948.
7. Stipulation and order substituting Florence
K. Livingston as executrix of last will of Florence
L. Kirchen, deceased, in place of Florence L. Kir-
chen, filed April 22, 1948.

8. Defendants' memorandum prior to trial filed April 23, 1948.

9. Plaintiff's memorandum prior to trial filed May 3, 1948.

10. The reporter's transcript of the evidence filed November 1, 1948.

11. All of the exhibits introduced during the trial, including plaintiff's exhibits 1, 1-A, 2, 3, 4, 4-A, 5, 6, 6-A, 6-B, 6-C, 7, 8, 9, 10, 11, 12, 12-A, 12-B, 12-C, 12-D, 12-E, 13, 14, 16, 16-A, 16-B, 16-C, 17, and defendants' exhibit 1 filed April 26, 1948.

12. All of the exhibits contained in the appendix to plaintiff's brief filed June 4, 1948, including the exhibits therein designated as A-1, A-2, B-1, B-2, C, D, E, F-1, F-2, F-3, G, and H.

13. Judge's memorandum filed May 20, 1949.

14. Judgment for defendants filed August 22, 1949.

15. Clerk's docket entries.

16. Notice of appeal filed October 20, 1949.

17. Statement of points.

18. This designation.

/s/ ERNEST A. TOLIN,

United States Attorney.

/s/ FRANCIS B. CRITCHLOW,

Special Assistant to the Attorney General, Attorneys for Plaintiff, United States of America.

[Endorsed]: Filed November 10, 1949.

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS
OF RECORD, PROCEEDINGS AND EVIDENCE ON APPEAL UNDER RULE 75(A)
FEDERAL RULES OF CIVIL PROCEDURE

To the Plaintiff Above Named and to Messrs. Ernest A. Tolin and Francis B. Critchlow, Its Attorneys:

Defendants above named, appellees herein, hereby designate for the record on appeal in addition to the contents of the record on appeal designated by plaintiffs herein, the following:

1. Copies of all the official plats of survey of various townships within the State of California made and approved by or under the authority of, and bearing the respective approval dates of, United States Surveyors General, the General Land Office, or the Department of the Interior, designated in Appendix "A" and Appendix "B" to defendants' opening brief filed herein June 5, 1948.

/s/ BRONTE M. AIKINS,
Attorney for Defendants A. L. Aikins and B. M. Aikins.

/s/ PHILIP M. WAGY,
Attorney for Defendants George Hay Corporation, Ltd., George B. Parker, Nelle Grenville Parker, Vernon S. Batz, Edna Batz, D. M. Jordan.

/s/ PATRICIA LANE,

Attorney for Defendant Florence K. Livingston,
as Executrix of the Last Will of Florence L.
Kirchen, Deceased.

/s/ A. W. MITCHEM,

/s/ ARCH H. VERNON,

/s/ HERBERT W. CLARK,

Attorneys for Defendants Honolulu Oil Corpora-
tion and Seaboard Oil Company of Delaware.

[Endorsed]: Filed November 22, 1949.

[Title of District Court and Cause.]

CLERK'S DOCKET ENTRIES.

1947

May 2—Fld compl to remove clouds, to quiet title
& to enjoin trespass in Kern Co. Issd
split Sum. Made Report J. S. 5.

May 19—Fld sum ret served as to A. L. Aikins,
B. M. Aikins, Florence L. Kirchen & Hon-
olulu Oil.

May 29—Fld sep stips and ords that defts Hono-
lulu Oil Corp and Seaboard Oil Co. of
Delaware; defts A. L. Aikins and B. M.
Aikins hv to & includg 6/30/47 to plead,
etc.

June 3—Fld sum ret serv.

June 10—Fld stip & ord ext time to answ of dfts
Florence Livingston, George B. Parker,
Nelle Grenville Parker, Vernon S. Batz,

1947

D. M. Jordan, & George Hay Corp to &
incl 6/30/47.

June 30—Fld answer.

June 30—Fld disclmr of County of Kern.

July 22—Fld stip & ord thereon dfts hv to & inc
8/11/47 to serve & file amended answ to
compl.

Aug 11—Fld amended answer to amended complt.
Fld amended complt.

Sept. 15—Ent ord contg to 10/6/47 10 am for set-
ting.

Sept. 16—Ent ord contg to 11/17/47 2 pm for set-
ting. Notif counsel.

Nov. 17—Ent ord setting for trial for March 1st,
1948, 10 A.M. all counsel notified in writ-
ing.

1948

Feb. 3—Ent ord (Y) vacating settg for trial of
3/1/48 htf made, & ent ord resettg trial
for 4/26/48 before J. Hall, to be tried
either in LA or Fresno as Judge Hall
may decide. Notif attys.

April 22—Fld Stip & Ord Bronte M. Aikins, as
exec. of Last Will Alice L. Aikins, de-
ceased be substd as deft in place of deft.
A. L. Aikins; Fld Stip & Ord Florence
K. Livingston, as Exec. last will Florence
L. Kirchen, deceased, be substd as deft
in place of Florence L. Kirchen.

April 23—Fld deft's Memo prior to trial.

1948

April 26—Ent proc on court trial before Judge Hall and ord submitting on simul. briefs to be filed in ten days and for each side to have five days to reply. Filed 17 exs. for Gov. Fld 1 ex for deft.

May 3—Fld Pltf's memo pur to local R. 12.

May 7—Fld stip and ord that plf and fts hv 30 days from 4/26/48 to file briefs and that either side may withdraw exbs to prepare briefs from Clerk.

May 12—Fld rect of Critchlow for exhibits.

June 3—Fld stip and ord that plfs and defts hv to & includg 6/7/48 to file written briefs and allowing parties ten days thereafter to file answering briefs.

June 4—Fld plfs brief with appendix to plfs brief in separate binder, on original only.

June 15—Fld plfs reply brief.

Nov 1—Fld reptr's transe proceedings 4/26/48.

1949

May 20—Fld Memorandum.

Aug. 8—Fld & ent JBK 5/254 judgmt for defts. Dock same. Made JS 6. Notified counsel.

Oct. 20—Fld pltfs notice of appeal. Mld copies to Messrs. Bronte M. Aikins, Philip M. Waggy, Patricia Lane, A. W. Mitchum, Arch H. Vernon & Herbert W. Clark, attys for defts.

1949

- Nov. 10—Fld pltfs design of contents of rec on appeal. Fld pltfs statmt of pts to be relied upon on appeal.
- Nov. 17—Fld pltfs affid svce by mail re: Design rec on Appeal.
- Nov. 21—Fld ord extendg time for flg & docketing rec on appeal & incldg 12/16/49.
- Nov. 22—Fld appellees desig of addnl ports of rec, proceedgs evid on appeal. Fld affid serv by mail.
- Dec. 2—Fld defts' opening brief. Fld defts' reply brief.
- Dec. 7—Fld substn of Herbert W. Clark, Gilbert E. Harris & A. W. Mitchem as attys for defts. Honolulu Oil Co. in place & stead of Herbert W. Clark, Arch H. Vernon and A. W. Mitchem.
- Dec. 14—Fld ord that time for flg rec etc on appeal be ext to & incldg 1/6/50.

In the District Court of the United States in and
for the Southern District of California, North-
ern Division

No. 617-ND—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

A. L. AIKINS, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Honorable Peirson M. Hall, Judge Presiding.

Appearances:

For the Plaintiff:

JAMES M. CARTER,

United States Attorney,

Los Angeles 12, California; by

FRANCIS B. CRITCHLOW,

Special Assistant to the Attorney

General,

Los Angeles 12, California.

For the Defendant Honolulu Oil Corporation
and Seaboard Oil Company:

HERBERT W. CLARK, Esq.,

1110 Crocker Building,

San Francisco 4, California.

For Defendants George Hay Corporation, Ltd.,
and Others:

PHILIP M. WAGY, Esq.,

310 Professional Building,

Bakersfield, California.

April 26, 1948; 10:00 o'Clock A. M.

* * *

The Clerk: The last case on the calendar, your Honor, is 617, United States v. A. L. Aikins, et al., for trial.

For the record, you are Mr. Herbert W. Clark?

Mr. Clark: Yes.

The Clerk: Is Mr. Critchlow here?

Mr. Critchlow: Yes.

The Clerk: May I have the name of other counsel in the case?

Mr. Waggy: Philip M. Waggy; W-a-g-y.

Mr. Clark: There are no other counsel present for the defendants, although there is a total of six of record. I have authority from the others to proceed in their behalf.

The Court: Now that we may have the appearances at this time, the Attorney General, Tom Clark, and Mr. Carter, United States Attorney, and Mr. Critchlow, Special Assistant to the Attorney General, appearing for the plaintiff?

Mr. Critchlow: That is correct.

The Court: And for the defendants, Mr. Clark is appearing for——

Mr. Clark: Honolulu Oil Corporation, Seaboard Oil Company, and there are two other appearances for the same defendants, Mr. Arch H. Vernon, of Los Angeles, and Mr. A. W. Mitchem, of Los Angeles.

The Court: Who is appearing for the County of Kern? Who is the attorney of record?

Mr. Critchlow: There is a disclaimer filed, if your Honor please.

The Court: And George Hay Corporation?

Mr. Wagy: I am appearing for George Hay Corporation, Ltd., George B. Parker, Nelle G. Parker, Vernon S. Batz, Edna Batz and D. M. Jordan.

The Court: Very well.

Who is counsel of record for A. L. Aikins?

Mr. Clark: Bronte M. Aikins of San Francisco.

The Court: And B. M. Aikins for himself in proper? I suppose that is Bronte M. Aikins?

Mr. Clark: Yes, sir.

The Court: And the defendant Florence K. Livingston?

Mr. Clark: That is Patricia Lane.

The Court: And you, Mr. Clark, are authorized to appear for all counsel not present?

Mr. Clark: Yes, your Honor. I have written authorization from all except Mr. Mitchem of the Seaboard Oil Company, and I represent the Seaboard anyway in my own right. I have his oral authorization over the long distance telephone.

The Court: Very well. Are you ready to proceed?

Mr. Critchlow: The plaintiff is ready.

Mr. Clark: Yes, your Honor.

The Court: Proceed.

Mr. Critchlow: Has your Honor had an opportunity to familiarize himself with the pleadings?

The Court: Yes, I read the complaint, the an-

swer, the memoranda filed on behalf of the plaintiff and the memoranda filed on behalf of the defendant Honolulu Oil Corporation and Seaboard Oil Company.

Mr. Critchlow: In view of that fact, your Honor, do you think it would be helpful if plaintiff made an opening statement?

The Court: I do not think you need to make an opening statement.

Mr. Critchlow: I am perfectly willing to do it, if your Honor desires it.

The Court: I am filing your memoranda, all of them.

What is the issue of fact here? This is on for trial. Who is contesting what fact?

Mr. Critchlow: Under the pleadings I can see but one issue of fact which concerns the plaintiff, and that arises by reason of the fact that there is a denial by the defendants of our allegation to the effect that the title to the area designated as Section 36 by the Reed survey of 1869 passed to the State of California excepting 160 acres that went to the preemptioneer proper, and from that the title to that area, Section 36 as described by the Reed survey, was transferred by the State and by Crocker to the State of California, I mean from the State of California to California grantees, and that the grantees of the State and Crocker have been in possession of that particular area as defined as Section 36 by the Reed survey.

The Court: Excluding the 160 acres?

Mr. Critchlow: No, including the 160 acres, but the 160 acres is admitted by the answer—the State selected 160 acres in lieu of the 160 acres which they had lost——

The Court: By preemption?

Mr. Critchlow: By the preemption and took title of that, and the grantees of the State have been in possession ever since of that 160 acres, which was also described and taken as part of the areas surveyed by Reed in Township 29 South, Range 20 East. So that our contention is that the State got its 640 acres.

The Court: What evidence are you going to put in?

Mr. Critchlow: I am going to put in the deeds, the patents from the State and things of that sort.

The Court: Very well.

Mr. Clark: I thought Mr. Critchlow and I had arranged that there would be no necessity for doing that. We can stipulate to exactly what happened there and save the Court all this time and trouble.

The Court: I would kind of look at these deeds and patents. In fact, in reading your statements and briefs over I have not had a chance to read the various cases you have cited, I just read some of them and then very hurriedly, and also the statute—I don't know, it seems to me it is almost common knowledge that throughout California at least there are a great many sections at the bottoms and sides of the townships that are odd sizes

in view of the fact that in Section 852 Congress seemed to contemplate that some such situation might occur—I do not recall whether it is Section 852 or 851—but in 851 they talk about fractional sections and in 852 about fractional townships.

In view of that whole thing, it would seem to me that it would be very material and might be helpful in deciding this case to know what the Government has done with relation to all those other odd sized sections, what has been their course of conduct in California. Have they recognized the title to them, or have they insisted that they are the owner? Have they confirmed deeds heretofore in other sections?

Mr. Critchlow: If your Honor please, that was my idea, that we should put in the documents themselves, which will speak for themselves, these deeds and the other documents which have to do with the question as to the validity of this Reed survey, what California took under it, and what California's position has been under it.

The Court: And what the Government's position has been?

Mr. Critchlow: And what the Government's position has been under it.

So, your Honor, if there is any question of interpretation between the parties your Honor will have the documents themselves and they will be part of the record in case of an appeal.

The Court: You refer, or one of you do in one of your memoranda, to a holding or ruling or

finding or letter or document or something by the Surveyor General of the United States to the effect that the Reed survey was fraudulent.

Mr. Critchlow: We want to put in evidence all the documents which bear upon that fact.

The Court: Do you have that document available?

Mr. Critchlow: Yes, and that is part of the evidence.

The Court: Do you have the number of sections in California that are fractional in the public land survey?

Mr. Critchlow: If your Honor please, we have not. Our position with reference to that is this—I think it is Section 751 of the Revised Statutes——

The Court: Where it says they should be as near 640 acres as may be?

Mr. Critchlow: Yes, but the same section provides that the sections which are either short or long, that is, if they contain more than 640 acres or less than 640 acres, it shall be on the northern tier of sections in a township or on the western tier of sections, so that Section 36, which is always the southeast section, is by statute defined as an area containing 640 acres as near as may be.

Do I make myself clear?

The Court: I understand. I remember that provision in there. But it so happens in California, at least on the west side, and I suppose I can take judicial notice of it because what I have learned has been from the maps and surveys in the land offices

around here that I have been looking at for 20 years, as I remember all the odd sizes are on the east and southern sides.

Mr. Critchlow: No, on the north and west sides.

The Court: That is what the law says. There is a lot of odd sizes along on the east and south sides.

Mr. Critchlow: That is not my idea of the situation, if your Honor please. Your odd sections are on the north and west.

The Court: Then you have not looked at the maps.

Mr. Critchlow: I have looked at them. I haven't looked at every township in California, but I have looked at a lot of them.

The Court: Very well. Let us get the evidence in here.

Mr. Critchlow: All right.

The Court: Then, Mr. Critchlow, it just occurs to me that if that is the case you have not all the parties here defendants that you should have unless Section 30, which lies to the east of your original Reed Section 36 was all public land and it still is public land.

Mr. Critchlow: No, if your Honor please, I think we have—it may be that we will have to put this on the map.

The Court: In other words, if these extra acres should go on the western side and these extra acres should belong to whoever got that land——

Mr. Critchlow: They have already been acquired, if your Honor please.

The Court: Acquired by whom?

Mr. Critchlow: By whoever either purchased them from the Government or they were selected by the State.

The Court: Then if you are correct in your contention that this did not belong to these people, that it automatically went to these other people——

Mr. Critchlow: No, your Honor. I don't follow you.

The Court: Should they not be here as parties defendant?

Mr. Critchlow: I don't think so. I think it will appear, if your Honor please, from the plats and the evidence which I will put in.

The Court: Very well.

Mr. Critchlow: During the recess I will draw a little diagram on the blackboard so that we can refer to it.

The Court: Have you any better maps than the photostats you have here? The line photostats are all right but this photostat I cannot read.

Mr. Critchlow: I will admit they are very bad. I have the plats here, if your Honor please, certified copies of the plats.

The Court: Are they black?

Mr. Critchlow: They are black, yes, but they are a good deal more legible than the reduced copies. The copies which are attached to the complaint are reduced from these copies which are certified plats.

Mr. Clark: I wonder if I might take about two minutes, with Mr. Critchlow's consent, to explain the position that I shall ultimately take in this case?

There are two surveys here, as the Court has said, the Reed survey of 1869 and the subsequent survey made in 1893.

The Court: The Carpenter survey?

Mr. Clark: Yes, sir.

Now the defendants claim under the Carpenter survey, and except for historical purposes the Reed survey is of no concern to us at all except for historical purposes and for the information of the Court; our position legally will be, as I see it, at least mine will be, as I see it, that if the land surveyed by the Carpenter survey was at that time public land that the approval of the survey segregated it from the public domain and passed the title immediately under the Act of 1853 to the State of California.

The Court: As Section 36?

Mr. Clark: As Section 36. It didn't make any difference how much the State had previously gotten.

The Court: That is the reason I am asking about the odd sizes, these acres. I notice you say some Surveyor General testified that frequently 16 and 36 would be the odd sizes.

Mr. Clark: Yes.

Mr. Critchlow: If your Honor please, that will come in the regular order.

The Court: Very well. Get your evidence in.

Mr. Clark: We tried to get this in in writing, with seven pages of stipulation here, and Mr. Critchlow justifiably objected to some characterization in the stipulation that I presented to him.

Mr. Critchlow: First I will have marked for identification a certified copy of the contract dated February 4, 1869, employing John Reed as the Deputy United States Surveyor to survey certain areas in the state of California.

There is attached to that, the bond under the survey.

May that be marked?

The Clerk: Government's Exhibit No. 1 for identification.

(The document referred to was marked Government's Exhibit No. 1 for identification.)

The Court: Do you have any objection to these going into evidence?

Mr. Clark: None at all, your Honor.

The Court: Let us put them in evidence then.

The Clerk: Government's Exhibit No. 1 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 1.)

Mr. Clark: They are all documents of which the Court can take judicial notice I think anyhow.

Mr. Critchlow: In view of the fact that this refers to the prior contract, I ask that this document which I have in my hand be marked as plaintiff's Exhibit No. 1-A, which is a contract dated December 3, 1869, between Shuman Day, Surveyor General of the United States for California, and John Reed, which provides that the prior contract, which is plaintiff's Exhibit No. 1, is supplemented by

these instructions which authorize Reed to survey the divisional lines in Township 29 South, Range 20 East.

The Clerk: Government's Exhibit 1-A in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 1-A.)

Mr. Critchlow: Your Honor please, let me have a moment to mark these.

Now the next document will be a certified copy of the field notes of Township 29 South, Range 20 East, executed by John Reed and James E. Freeman, in so far as they relate to Section 36.

May that be marked as plaintiff's Exhibit 2.

The Clerk: Government's Exhibit 2 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 2.)

Mr. Critchlow: Now the next document is a certified copy of the official plat of Township 29 South, Range 20 East, bearing date of April 27, 1869. That is the plat of the Reed survey.

The Court: That is the whole township?

Mr. Critchlow: That is the whole township.

The Court: Very well. Let me see it

(The document referred to was passed to the Court.)

Mr. Critchlow: Now, if your Honor please, I offer in evidence a certified copy of a packet from

the State of California to Henry Miller and Charles Lux, dated the 1st day of March, 1873, which purports to convey to the grantees, Henry Miller and Charles Lux, 360 acres of Section 36, Township 29 South, Range 20 East.

May that be marked?

The Court: That was a patent?

Mr. Critchlow: Yes.

The Clerk calls my attention to the fact that the plat which I just handed your Honor has not been marked.

The Court: Very well. That will be No. 3.

The Clerk: Government's Exhibit No. 3 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 3.)

[Government's Exhibit 3 is identical to Exhibit A attached to the Complaint. See page 12 of this printed record.]

The Court: No. 4 will be the patent to Miller and Lux.

The Clerk: Government's Exhibit No. 4 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 4.)

The Court: Was that under the Swampland Act?

Mr. Critchlow: No. It is the selected State's 36. Now, if your Honor please, this document is a

photostatic copy and it is very difficult to read. I have made a copy of it.

The Court: Just attach it to the exhibit. We will call that Exhibit 4-A.

Have you seen it, counsel?

Mr. Clark: What is it, Mr. Critchlow?

Mr. Critchlow: It is a copy so that the Court can read it.

The Court: It is a copy of the Miller and Lux patent.

The Clerk: That will be Government's Exhibit 4-A in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 4-A.)

Mr. Critchlow: Now, if your Honor please, I ask to be marked as plaintiff's Exhibit 5, a certified copy of a patent from the United States of America to Edwin M. Crocker, dated the 15th day of April, 1871, covering 160 acres of land in Section 36, Township 29 South, Range 20 East.

The Court: Are either the 360 of the Miller and Lux property or this otherwise described?

Mr. Critchlow: Yes, they are described by the legal subdivisions.

The Court: Very well.

Mr. Critchlow: This is the preemption to Crocker which is mentioned in the pleadings which does not pass to the State by reason of the fact that it was occupied at the time the survey was approved.

(The document referred to was received in evidence and marked Government's Exhibit No. 5.)

Mr. Critchlow: Now, if your Honor please, I will ask to be marked as Government's No. 6, a patent from the State of California to one J. J. Mack, for the south half of the southeast quarter and the southeast quarter of the southwest quarter of Section 36 in Township 29 South, Range 20 East, Mount Diablo Meridian, containing 120 acres.

This patent is dated March 9, 1894.

The Court: What is the name?

Mr. Critchlow: J. J. Mack.

The Clerk: Government's Exhibit 6 for identification.

The Court: Is there some objection to that?

Mr. Clark: No.

Mr. Critchlow: I am going to offer some other documents and I will see if there is.

The Court: He says there is no objection so it is in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 6.)

GOVERNMENT'S EXHIBIT No. 6

United States of America
State of California

To all to whom these Presents shall Come, Greeting:

Whereas, Under the provisions of the several Acts of the Congress of the United States, entitled

“An Act to appropriate the proceeds of the sales of the Public Lands and to grant Pre-emption Rights,” approved September fourth, eighteen hundred and forty-one, Five Hundred Thousand Acres of the Public Lands were granted to the State of California; and an Act entitled “An Act to provide for the survey of the Public Lands in California, the granting of Pre-emption Rights therein, and for other purposes,” approved March third, eighteen hundred and fifty-three, Ten Sections of Land were granted for the erection of Public Buildings, and Seventy-two Sections for a Seminary of Learning, also, the Sixteenth and Thirty-Sixth Sections of each Township in said State; also, an Act entitled, “An Act donating Public Lands to the several States and Territories which may provide Colleges for the benefit of Agriculture and the Mechanic Arts,” approved July second, eighteen hundred and sixty-two, One Hundred and Fifty Thousand Acres of the Public Lands were also granted to said State;

And Whereas, The Legislature of the State of California has provided for the Sale and Conveyance of said Lands by Statutes enacted from time to time;

And Whereas, It appears by the Certificate of the Register of the State Land Office, No. 8459 issued in accordance with the provisions of law, bearing date the Ninth day of March, A. D. 1894, that the tracts of Grant of Sixteenth and Thirty-sixth Section School Land hereinafter described have been duly and properly located in accordance with law,

and that J. J. Mack is entitled to receive a Patent therefor.

Now, Therefore, The State of California hereby grants to the said J. J. Mack and to his heirs and assigns forever, the said tracts of land, located as aforesaid, and which are known and described as follows, to wit: The South half of Southeast quarter and Southeast quarter of Southwest quarter of Section Thirty-six (36) in Township Twenty-nine (29) South, Range Twenty (20) East, Mount Diablo Meridian containing One hundred and twenty (120) acres, together with all the privileges and appurtenances thereunto appertaining and belonging. To have and to hold the aforegranted premises to the said J. J. Mack and to his heirs and assigns, to him and their use and behoof forever

In Testimony Whereof, I, H. H. Markham, Governor of the State of California, have caused these Letters to be made Patent, and the Seal of the State of California to be hereunto affixed.

Given under my Hand, at the City of Sacramento, this the Ninth day of March, in the year of our Lord one thousand eight hundred and ninety-four.

H. H. MARKHAM,
Governor of State.

Attest:

[Seal]

E. G. WAITE,
Secretary of State

By WM. H. STEVENS,
Deputy.

Countersigned:

[Seal]

THEO. REICHERT,

Register of State Land Office.

By D. M. ANGEIR,

Deputy.

A full, true and correct copy of the original recorded at the request of J. J. Mack, March 10, A.D. 1894, at 45 min. past one o'clock p.m.

T. A. WELLS,

Register of Deeds.

/s/ By NELSON W. WELLS,

Deputy.

State of California,

County of Kern—ss.

I, Chas. H. Shomate, County Recorder of said County, do hereby certify that the annexed is a whole true and correct copy of an original as will appear by reference to Book 8 of Patents Page 13 now in my office and that said copy has been compared with original and is a correct transcript therefrom.

Witness my hand and official seal this 19th day of March A.D., 1947.

CHAS. H. SHOMATE,

Recorder in and for the County of Kern, California.

By /s/ VADA SMITH,

Deputy.

Received in evidence April 26, 1948.

Mr. Critchlow: I am going to have marked for identification, and if there is no objection I will offer it, plaintiff's Exhibit 6-A, 6-B and 6-C. Exhibit 6-A is an application to purchase state lands made by J. J. Mack under date of July 30, 1892. The lands applied for are described in the application as being the south half of the southeast quarter and the southeast quarter of the southwest quarter of Section 36, Township 29 South, Range 20 East, Mount Diablo Meridian.

As Exhibit 6-B, a certificate of purchase of the State Land Office in the State of California dated November 29, 1892, issued to J. J. Mack and covering the lands described in plaintiff's Exhibit No. 6-A.

The next document, which will be marked for identification as 6-C, is a letter from the Surveyor General and Ex-officio Registrar of the State Land Office, addressed to the Title Insurance and Trust Company, Los Angeles, California, dated February 2, 1927.

I think that Mr. Clark should read that and see whether he has any objection to it.

(Conference between counsel.)

Mr. Clark: The Court will indulge me just a moment?

The Court: Why do we not have a recess? Do you have any other exhibits that he has not seen?

Mr. Critchlow: No, I think he has seen all the rest of them.

The Court: During the recess if you have any others why not show them to him?

Mr. Critchlow: There may be one or two others that I haven't shown him.

The Court: Very well. If we do that it may save some time

Mr. Clark: I am not going to try to keep them out of the record, I am merely reserving an objection to them after I look at them.

The Court: Very well. You may have an objection to this Exhibit 6-C.

Mr. Clark: Yes.

The Court: Exhibits 6-A and 6-B are admitted. They are public records. This is a private record.

The Clerk: Government's Exhibits 6-A and 6-B received in evidence.

(The documents referred to were received in evidence and marked Government's Exhibits 6-A and 6-B respectively.)



APPLICATION TO PURCHASE STATE LANDS.

Location No. 3827

Visalia Land District

STATE OF CALIFORNIA,
County of Kern

To the State Surveyor-General, Sacramento:

I, J. J. Mack, of Kern County,

do hereby apply to purchase the land hereinafter described, and in support of my application I do solemnly swear that I am Nahie Born, a citizen of the United States, a resident of this State, of lawful age. That I desire to purchase from the State of California, under provisions of title eight of the Political Code, the following described land in Kern

County, to wit: South half of the South East quarter and the South East quarter of the South West Quarter of Section 36 in Township 29 South of Range 20 East, M. D. M.

Containing One Hundred and Twenty acres.

That there is no occupation of said land adverse to any that I have (a)

That I desire to purchase the same for my own use and benefit, and for the use or benefit of no other person or persons whomsoever, and that I have made no contract or agreement to sell the same (b)

That said land is not suitable for cultivation; that I have not entered any portion of any lands mentioned in section three thousand four hundred and ninety-four of the Political Code (to wit, the unsold portion of the five hundred thousand acres granted to the State for school purposes, the sixteenth and thirty-sixth sections, and the Lands selected in lieu thereof, which together with that now sought to be purchased, exceeds (c) ~~thirty~~ and twenty acres, and that said land is not timbered land

Subscribed and sworn to before me this 30th

day of July, 1902

Post Office Address

J. J. Mack, Notary Public

Barstow, Kern County.

(a) If there is an adverse occupation then the applicant must show that the township has been surveyed three months, and that the adverse occupant (giving the name) has been in such occupation for more than sixty days since the plat was filed in the United States Land Office. (Section 3607, Political Code.)
(b) If the land is suitable for cultivation then he must add: That I am not actual with the team.
(c) If the land is suitable for cultivation then the area to be hereinafter used for three hundred and twenty acres otherwise six hundred and forty acres.
Note: If the applicant is a female the applicant must show that she is entitled to purchase and hold real estate in her own name. (Section 3608, Political Code.)
Lands belonging to the State, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be provided by law. (Section 3609, Political Code.)
Any false statement contained in the affidavit provided for in section three thousand four hundred and ninety-five defeats the right of the applicant to purchase the land, or to receive any volume of title thereto, and it willfully false, subject him also to punishment for perjury. Timber lands belonging to this State shall be sold for cash only, and the Surveyor General must make and enforce all necessary rules and regulations to prevent the sale of or issuance of any evidence of title to any timber land of the State except on payment in cash of the full price therefor by law. (Section 3610, Political Code.)
All applications, under whatever Act, filed in the office of the Surveyor General must be retained ninety days before approval and must be approved (such is the case) by the Surveyor General, at the expiration of six months subject, however, to the provisions of sections thirty-four hundred and six, and thirty-four hundred and seven of this Code, and all unapproved applications which have been on file over six months, wherein the approval has not been demanded, or where the contest has not been referred to Court, or a demand made for an order of reference, on provided to section thirty-four hundred and fourteen of the Political Code, shall be null and void.
This Act shall take effect on the first day of August, eighteen hundred and eighty-five and the Surveyor General shall give notice to each applicant to be affected thereby, by sending to said applicant, or his attorney, a copy of this Act. (Section 3606, Political Code.)

Each Application must be accompanied by a deposit of \$20 and filing fee of \$5.

READ YOUR APPLICATION CAREFULLY.

Location No. 3827

CERTIFICATE OF PURCHASE

No. 2091

Visalia Land District.

State Land Office of the State of California.

STATE SCHOOL LAND GRANT

OF 16TH AND 36TH SECTIONS.

Price Per Acre, 6One 10 Dollars.SACRAMENTO, 29th day of November, 1892.

It Appearing from the Report of the County Treasurer, That on November 15th, 1892, J. J. Black,
 paid to the STATE OF CALIFORNIA the sum of One hundred and fifty — 150 DOLLARS, being payment in full
 for 120 Acres of STATE SCHOOL LAND, described as follows:

1/2 of S 1/4 and S 1/4 of S 1/4 of Section 36.

in Township No. 29th North Range No. 20 East. Mount Diablo Meridian.

Now, Therefore, be it Known, That the said J. J. Black, having made payment in full for the above described
 tract of land, is the purchaser of the same; and after having in all other respects complied with the requirements of the laws providing for the sale of said
 lands, and ON SURRENDERING THIS CERTIFICATE TO THE STATE OF CALIFORNIA, and after the said lands have been confirmed to the State, the said

J. J. Black, or his assigns, shall be entitled to receive a Patent for the same.

In Witness Whereof, The Register of said Land Office has hereunto set his hand and affixed
 his seal of office, the day and date above written.

Wm. Reicher
 Register State Land Office.

Kern County.

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same date.)

April 26, 1948, 2:00 o'Clock P.M.

(Other court matters.)

The Court: Very well, Mr. Critchlow, you may proceed.

Mr. Critchlow: At the adjournment we were talking about Exhibit 6-C. I understand that there is no objection.

Mr. Clark: No objection, if the Court please.

Mr. Critchlow: If your Honor please, I call attention——

The Court: Just a moment. I was looking at some stipulations here in another matter. You say there was no objection to this exhibit?

Mr. Clark: No.

The Court: It will be admitted

The Clerk: 6-C admitted in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 6-C.)

GOVERNMENT'S EXHIBIT No. 6-C

February 2, 1927.

Title Insurance and Trust Company,
Title Insurance Building,
Los Angeles, California.

Your Order No. 44237-WCL

Gentlemen:

I am in receipt of your letter of January 26, 1927, asking if it is my construction that the patent issued by the State, March 9, 1894, to J. J. Mack, for the S $\frac{1}{2}$ of SE $\frac{1}{4}$ and SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 36, T. 29 S., R. 20 E., M. D. M., granted the lands according to the survey thereof made by United States Deputy Surveyor H. B. Carpenter, which was approved in 1893, which a later survey by Carpenter, approved April 7, 1915, shows as Lots 9, 10 and 11.

Application No. 3827, Visalia Land District, of J. J. Mack, for the S $\frac{1}{2}$ of SE $\frac{1}{4}$ and SE $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 36, T. 29 S., R. 20 E., M. D. M., was filed in this office August 1, 1892, and full paid certificate of purchase was issued November 29, 1892. The only existent plat of survey of said Section 36 in 1892 being the one approved April 27, 1869, the patent issued to J. J. Mack for said land March 9, 1894, was issued according to said survey of April 27, 1869.

The sixteenth and thirty-sixth sections in this State were granted to the State of California for the purposes of public schools, by an Act of Congress, approved March 3, 1853, the statute being both a

grant and a conveyance, so far as the lands were of the character granted and otherwise subject thereto. No patent or listing is necessary to convey title to the State, the approval of the survey being deemed a sufficient designation of the particular subdivisions. (Cooper v. Roberts, 18 How. 173; Southern Development Co. v. Endersen, 200 Fed. 272-274.) The area that passed to the State under the survey of 1869 is 640 acres.

Yours Respectfully,

/s/ [Indistinguishable],

Surveyor General and ex officio Register of State
Land Office.

BLD

BG

Received in evidence April 26, 1948.

Mr. Clark: Would you mind explaining to the Court briefly what that is, Mr. Critchlow? I don't mean the map, but the letter.

Mr. Critchlow: The reason for it?

Mr. Clark: Yes, the reason for it.

Mr. Critchlow: The reason for that is this: We have in evidence Exhibit 4, which is a patent from the State of California covering these portions of Reed's Section 36. In other words, they were conveyed when that was the only survey of the area. They were conveyed to Miller and Lux, that is, as individuals, Henry Miller and Charles Lux, that quarter section, to Miller and Lux this half quar-

ter, and Miller and Lux that quarter quarter, and to Miller and Lux this half quarter. (Indicating on blackboard.) In other words, there were 360 acres all told.

The Court: Just a moment. You have a line across that northeast quarter there on the map.

Mr. Critchlow: I should explain that first.

For this purpose we will disregard this square, your Honor please, because this is the Carpenter survey which was made in 1893. When these patents which we are now discussing were issued, there was no such square.

Now in plaintiff's Exhibit 5, that was a patent from the United States to Crocker on a preemption entry which was in effect at the time of this 1869 survey. That patent covered this quarter, this 80 acres, which is a half section, and this quarter quarter down there. (Indicating on blackboard.) That was in 1871. That is 160 acres. That left the south half of the southwest quarter and the southeast quarter of the southwest quarter in the State of California.

The Court: 120 acres?

Mr. Critchlow: 120 acres.

Now in 1892, which was still prior to the Carpenter survey, in other words, at that time we may disregard these lines because there weren't any such lines, J. J. Mack filed an application with the State to purchase——

The Court: What is that total acreage?

Mr. Critchlow: 640.

The Court: Yes?

Mr. Critchlow: J. J. Mack filed with the State of California an application to purchase the south half of the southeast quarter and the southeast quarter of the southwest quarter, which is this 120 acres. A certificate of purchase was issued to him also in 1892 prior to this Carpenter survey.

Now the deed or the patent from the State, which is Exhibit 6, wasn't issued on that application and the certificate of purchase until 1894, which was after the Carpenter survey, but it was issued on this application and purchase in 1892. The contention of the State is, and the contention of the people is, that it was the intent to transfer by that patent the lands applied for which were on the basis of the Carpenter survey. That is the reason for putting in those documents.

The Court: Just a moment. The lands applied for were applied for on the basis of the Reed survey?

Mr. Critchlow: I misspoke myself—on the basis of the Reed survey. That is the Government's position and it is everybody's position, and it is the defendants' position, because if that isn't the effect of that patent then—in other words, if it should be construed as being issued on the basis of the Carpenter survey, the defendants in this case would have no interest in the land because the State would have conveyed it prior to the patent to Jordan in 1915.

Do I make myself clear?

The Court: I follow you. However, it would be helpful if you could have a diagram drawn by some draftsman covering that.

Mr. Critchlow: Yes.

The Court: I mean, with the various areas cross-hatched or colored differently so that the boundaries and everything will be clearly set forth.

Mr. Critchlow: I can do that, if your Honor please.

The Court: Your Carpenter survey added only what you have indicated there or did it add along the whole south tier of 36 or the whole south tier of the township?

Mr. Critchlow: Just as far as Section 36 is concerned, it added this area. (Indicating on black-board.)

The Court: Was there any added strip to the east?

Mr. Critchlow: On other sections?

The Court: No, to the east on 36, the north-east quarter.

Mr. Critchlow: This? (Indicating on black-board.)

The Court: No, above that.

Mr. Critchlow: Yes.

The Court: So the Carpenter survey was not limited to Section 36?

Mr. Critchlow: That is right.

The Court: It took in the whole township?

Mr. Critchlow: That is right And that will appear when we put in the Carpenter survey, if your Honor please.

I cannot do it all at once.

The Court: I understand.

Mr. Critchlow: Now in this connection I want to clear up this fact that the State and its grantees have true ownership and possession of that entire area, Section 36, under the Reed survey and I will then ask to be marked as Exhibit 7 a certified copy of a decree acquiring title in the case of Miller and Lux v. W. H. Beemis.

This is in the Superior Court of the State of California, in and for the County of Kern. It bears date of February 11, 1922.

It is certified by the County Recorder of Kern County, this being a Recorder's document.

The Clerk: Government's Exhibit 7 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 7.)

Mr. Critchlow: Now in connection with that, if your Honor please, I think it can be stipulated by opposing counsel that prior to the year 1912 all of the lands in Section 36, Township 29 South, Range 20 East, conveyed to Henry Miller and Charles Lux, to Edwin M. Crocker and to J. J. Mack, this are the conveyances referred to in plaintiff's Exhibits 4, 5 and 6, were by mean conveyances to Miller and Lux, Inc.

Mr. Clark: So stipulated.

The Court: What year was that?

Mr. Critchlow: Prior to the year 1912.

The Court: 640 acres by mean conveyances to Miller and Lux?

Mr. Critchlow: That is right.

Now, if your Honor please, I call attention to the allegation contained in Paragraph X as amended of the plaintiff's complaint.

The Court: That is the one filed May 2, 1947?

Mr. Critchlow: The amendment was filed August 11, 1947.

The Court: Amendment to the complaint?

Mr. Critchlow: That is correct.

The Court: Very well.

Mr. Critchlow: It amends Paragraph X of the complaint to read as follows:

"On January 10, 1870, plaintiff granted by letters patent to the aforesaid Edwin M. Crocker the 160 acre parcel embraced in the pre-emption claim referred to in Paragraph IX hereof and thereafter, on or about October 7, 1974, plaintiff, as indemnity to the State of California for its loss of acreage because of the said Crocker pre-emption and at the request and on the selection of said State, granted to said State 160 acres of land in Sections 26 and 35, Township 29 South, Range 20 East, M.D.B.M., as defined by said survey approved April 27, 1869, whereupon the State of California assumed ownership, possession and control over said 160 acres in said Sections 26 and 35, and has since sold and conveyed the same to its grantees who or whose successors in interest have been at all times since and now are in possession thereof."

That paragraph is omitted from the answer. So we have shown that the State acquired and dis-

posed of 640 acres under its grant of Section 36 in this township.

Mr. Clark: I wouldn't want to put it that way. I would say the facts show—there is no use arguing it now—that the State acquired and disposed of 640 acres. Now whether it is under its grant is another question. I don't want anything to appear to limit the amount the State is entitled to, that is all.

The Court: Whatever it is under, they disposed of 640 acres?

Mr. Clark: That is right.

The Court: Prior to the Carpenter survey.

Mr. Clark: Right.

Mr. Critchlow: Prior to the Carpenter survey.

Mr. Clark: All prior to 1893.

The Court: Yes.

Mr. Critchlow: Now, if your Honor please, the Mack certificate of purchase was issued in 1892.

The Court: The application was in 1892 but the certificate was issued after the Carpenter survey.

Mr. Critchlow: No, the certificate of purchase was issued in 1892 but the State patent, the deed, the certificate of purchase, which evidences his right to a patent——

The Court: He did not get his patent until——

Mr. Critchlow: He did not get his patent until after the Carpenter survey.

The Court: Then that stipulation will be subject to whatever effect that patent might have had.

Mr. Critchlow: It is the Government's construction, the State's construction and the defendants' construction, that the patent is construed with reference to the prior application and certificate.

Mr. Clark: That is right.

Mr. Critchlow: With reference to the Reed survey.

Mr. Clark: The patent issued pursuant to the application and purchase.

The Court: The patent was merely a formal evidence of the right obtained by this certificate of purchase.

Mr. Clark: That is right. It is confirmatory of that certificate of purchase.

Mr. Critchlow: What is the next number, Mr. Clerk?

The Clerk: No. 8.

Mr. Critchlow: We ask that the following document be marked as plaintiff's Exhibit No. 8, which is a certified copy of a letter dated November 29, 1892, addressed to the United States Surveyor General, San Francisco, California.

I might add, that is the United States Surveyor General, not of the State. This is from the Assistant Commissioner of the General Land Office. It is rather a long letter. I will not take the time to read it.

The Court: Is this the one where he says the Reed survey is fraudulent?

Mr. Critchlow: Yes. I will call your attention to those remarks and to the—well, the whole tone of the letter.

The Court: Very well. I notice that he characterizes Reed's survey as "grossly erroneous and worthless as a basis for the disposal of the lands."

Mr. Critchlow: That is what he said.

The Court: And he speaks of the fraudulent Reed survey?

Mr. Critchlow: Yes.

The Court: Very well. Your next number will be No. 9.

The Clerk: Is this admitted, your Honor?

The Court: Yes, it is admitted.

The Clerk: This will be Government's Exhibit 8.

(The document referred to was received in evidence and marked Government's Exhibit No. 8.)

GOVERNMENT'S EXHIBIT No. 8

No. 1019

United States of America

[Seal of The National Archives of the United States—1934.]

The National Archives

To all to whom these presents shall come, Greeting:

I Certify That the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document

Government's Exhibit No. 8—(Continued)
in the official custody of the Archivist of the United States.

Press Copies of "E" Letters Sent, Volume 90.

These documents are from the records of the General Land Office.

In testimony whereof, I, Solon J. Buck, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief or Acting Chief of the General Reference Division of the National Archives, in the District of Columbia, this 27th day of June, 1947.

/s/ SOLON J. BUCK,

Archivist of the United States.

[Seal] By /s/ BESS GLENN,

Acting Chief, General
Reference Division.

See from Wm Brown et al, the 26. 1893 ¹⁸⁹³ - protest against reducing of 30 S. 21 E 163

E
101496-1891
4883-1892

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE.

WASHINGTON, D. C.,

November 29. 1892.

The U. S. Surveyor General,
San Francisco, California.

Sir:

With your letter dated August 7, 1891, there were transmitted copies of the application and papers filed in support thereof, of Charles O'Connell for an additional survey in township 29 south, range 20 east, M.D.M.

Mr. O'Connell alleges that he is an actual settler upon what to the best of his belief will be a portion of section 36, township 29 south, range 20 east, and which lies between section 1, township 30 south, range 20 east, the north boundary of which was established by Deputy Surveyor James E. Freeman, and section 36, township 29 south, range 20 east, M.D.M., the south boundary of which was established by Deputy Surveyor John Reed.

The application of O'Connell is for the survey of an alleged hiatus about 33.50 chains in width, lying between Freeman's established north boundary of township 30 south, range 20 east, and Reed's south boundary of township 29 south, range 20 east, and is accompanied by an affidavit by John Gilcrest, to the effect that he had made an examination of the surveys in townships 29 and 30

Government's Exhibit No. 8—(Continued)
in the official custody of the Archivist of the United States.

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These documents are from the records of the General Land Office.

In testimony whereof, I, Solon J. Buck, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief or Acting Chief of the General Reference Division of the National Archives, in the District of Columbia, this 27th day of June, 1947.

/s/ SOLON J. BUCK,

Archivist of the United States.

[Seal] By /s/ BESS GLENN,

Acting Chief, General
Reference Division.

Sac from Wm Brown et al, Apr 26, 1893 ⁴⁴⁶⁶⁶/₁₈₉₃ - protest against reading of 169
 " to " May " 30, 4, 218
 " to T. Paul Cal May " 1

E
101496-1891
4883-1892

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GENERAL LAND OFFICE.

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Government's Exhibit No. 8—(Continued)

south, range 20 east, and found evidence of the correctness of the Freeman survey, but that the Reed survey was largely fictitious, and that he (Reed) did not begin and close upon the Freeman survey as claimed in his field notes.

You refer in connection with O'Connell's application to a letter from your office, dated August 1, 1889, forwarding the petition of Henry Miller for a resurvey of townships 29 and 30 south, ranges 20 and 21 east, M.D.M., accompanied by a plat of a private survey of said townships, illustrating the alleged position of the lines therein. According to said diagram the Reed lines did not connect with nor close with the township surveys, but left strips of unsurveyed public land, varying in width from a few chains to nearly half a mile between the townships, except between townships 29 and 30 south, range 21 east, where said diagram showed an overlapping of the surveys. It was represented that owners of patented lands could not clearly define their boundaries, and you recommended that a resurvey be ordered.

By letter "E" of August 21, 1889, this office declined to accede to the request for a resurvey, but suggested a re-establishment of the lines by the county surveyor in accordance with the approved rules contained in circular of March 13, 1883.

In your letter transmitting Mr. O'Connell's application you recommended, in order to secure the survey of an unsurveyed strip of land, that Mr.

Government's Exhibit No. 8—(Continued)

George S. Fawkner, special agent, be instructed to make an examination of the surveys in question to determine if the corners of the Reed survey in township 29 south, range 20 east M.D.M., were ever set, and if so, whether they were located as described in his notes, and whether his survey did connect properly with the Freeman survey, and in the event of the survey being found fictitious or incorrectly made, that a resurvey on the lines of former purported surveys and an additional survey to locate and define the boundaries of the alleged strip of unsurveyed land, be authorized in townships 29 and 30 south, ranges 20 and 21 east, M. D. M.

In view of your recommendation of an examination of the surveys in question, this office, under date of August 29, 1891, directed Special Agent Fawkner to proceed to the field and make a careful examination sufficiently extended to show the exact status of the surveys in township 29 south, range 20 east, and to submit full and explicit report and field notes with a diagram showing the relative positions of all corners on the lines retraced by him, and to note the positions of all settlers' claims, and indicate the same upon his diagram.

The examination was made by Mr. Fawkner as directed, and his report and field notes were duly received at this office, but owing to the great pressure of urgent work, the consideration of his report has been deferred.

Government's Exhibit No. 8—(Continued)

An examination of the report of the special agent shows as follows:

Mr. Fawkner commenced his investigation at the corner to Tps. 29 and 30 S., Rs. 19 and 20 E., thence eastwardly upon the north boundary of T. 30 S., R. 20 E., as established by Deputy Freeman. A sufficient number of corners were found to fully identify Freeman's line which appears to have been correctly established, and in accordance with his field notes. The northeast corner of T. 30 S., R. 20 E., established by Freeman in 1855 for corner to Tps. 29 and 30 S., Rs. 20 and 21 E., was found to have its original stake in a fair state of preservation, and its exact location was confirmed by measurements from the quarter section corner on the south line of section 36, witnessed by bearing trees described by Freeman; also from the corner to sections 1, 6, 7 and 12 T. 30 S., Rs. 20 and 21 E., which latter corner had also the original stake.

From this corner Fawkner ran a line in accordance with courses given in the Reed and Henry field notes, finding no corners in proper positions, relative to the Freeman corner, but found certain corners established by Deputies Henry and Reed on the line between Tps. 29 S., Rs. 20 and 21 E., at distances varying from 16.95 chains to 27.84 chains east of his (Fawkner's) line, and at 6 miles 15.65 chains intersected the 7th standard parallel established by A. W. Von Schmidt and C. D. Gibbs

Government's Exhibit No. 8—(Continued)

16.55 chains west of the corner to Tps. 29 S., Rs. 20 and 21 E. (Von Schmidt's corner) verified by measurements east and west on said 7th standard.

From the corner to Tps. 29 S., Rs. 20 and 21 E., as established by Von Schmidt, Fawkner retraced the line between Tps. 29 S., Rs. 20 and 21 E., as follows:

S. $0^{\circ} 10'$ E. bet. secs. 1 and 6,

Var. $13^{\circ} 30'$ E.

80.25 Cor. to secs. 1, 6, 7 & 12. (Henry).

S. $0^{\circ} 10'$ E., bet. secs. 7 & 12.

Var. 14° E.

No mention of quarter sec. cor.

81.15 15 lks. E. of old Henry corner.

S. $0^{\circ} 10'$ E. of line bet. secs. 13 and 18,

Var. $13\frac{1}{2}^{\circ}$ E.

No mention of quar. sec. cor.

79.61 Cor. to secs. 13, 18, 19 and 24.

S. $0^{\circ} 10'$ E. bet. secs. 19 & 24.

Var. $13\frac{1}{2}^{\circ}$ E.

40.00 No corner.

60.50 Find one of Reed's posts marked

S. 19, R. 21

S. 30

R. 20 E. T. 29 S., with 2 and 4

notches, lying on ground, no mound nor pits.

80.10 Mound of earth & rocks, with charcoal, 50

Government's Exhibit No. 8—(Continued)

lks E. of line. Henry's corner for secs. 19, 24, 25 and 30.

S. $0^{\circ} 12'$ E. bet. secs. 25 and 30,

Var. 14° E. (as per Reed's notes).

40.00 No corner.

60.50 Reed's stake lying 5.71 chs. west of line, marks illegible. 5 notches on one edge.

80.00 No corner.

S. $0^{\circ} 12'$ E. bet. secs. 31 & 36.

Var. 14° E. (as per Reed's notes).

40.00 No corner,

80.00 No corner.

98.22 Intersect S. boundary 32.54 chs. E. of Freeman's corner to Tps. 29 & 30 S., Rs., 20 & 21 E.

Mr. Fawkner then proceeded to the corner to sections 33 and 34 on south boundary of T. 29 S., R. 20 E. (Freeman's line) and running north at 21.86 chs. finds white oak tree, old blazes on both sides (Reed mentions a white oak tree 2 feet in diameter on his line between sections 33 and 34 at 21.13 chains); thence north to point for quarter section corner, but found only a stake set by U. S. Deputy Surveyor Capt. Frazer in a private survey.

From this stake Fawkner ran E., Var. 14° E. and at 38.67 found oak tree mentioned by Gilcrest one chain south of line (marked with the same lettering tools used by John Reed, but not mentioned in his notes), for corner to sections 3, 4, 33 and 34.

Government's Exhibit No. 8—(Continued)

From this point E., Var. 14° E., and at 149.06 a new redwood post with two pieces of Reed's stake lying alongside 2.88 chains south of Fawkner's line. This is Reed's corner for sections 1, 2, 35 and 36. No corners were found between the oak tree and the redwood post.

From Reed's corner to sections 1, 2, 35 and 36 Fawkner ran east, Var. 14° E. and at the intersection with the south prolongation of the Reed line from corner to sections 25 and 36, the distance to the Freeman line was found to be 36.12 chains, this being the width of the hiatus between the Reed and Freeman lines.

Mr. Fawkner's measurement between the corner to Tps. 29 and 30 S., Rs. 20 and 21 E., and the 7th standard parallel is 6 miles 15.65 chains, an excess of 15.65 chains in the width of Tp. 29 S., but the hiatus between the Reed and Freeman lines between Tps. 29 and 30 S. is, according to Fawkner's finding 36.12 chains, the difference 20.47 chains being caused by the overlapping of the Reed and Henry lines on the line between sections 19 and 24.

Fawkner reports in regard to the connections made by John Reed with the Freeman line that he found only the apparent connection, on the line between sections 33 and 34, township 29 south, range 20 east, viz: the oak tree above referred to at 21.86 chains north of Freeman's corner to sections 3, 4, 33 and 34 (distance given by Reed 21.13) marked by old blazes and which may or may not be

Government's Exhibit No. 8—(Continued)

the tree mentioned by Reed. Fawkner ran lines north from Freeman's corners, between sections 32 and 33; 33 and 34; 34 and 35; 35 and 36 without finding either section or quarter section corners in any instance. He also reports that the north boundary of T. 29 S., R. 20 E., west of Gibbs' survey, and which Reed purports to have established, is as devoid of corners as are the subdivision of lines of Reed.

In regard to the Reed survey, Fawkner expresses the opinion that Reed had cognizance of the Freeman line, nevertheless he arbitrarily established the corner to sections 35 and 36 near the El Temblor Ranch House the position of which is indicated in his notes as being 10 chains north and 3 chains east of his corner to sections 35 and 36.

From the condition of the lines and corners as determined by the examination of Special Agent George S. Fawkner, but one conclusion can be drawn, viz: that the surveys purported to have been made by John Reed, U. S. Deputy Surveyor, in T. 29 S., R. 20 E., are in the main, fictitious and that the lines and corners which were run and marked by him were arbitrarily established without regard to the previously established township boundaries, and if any considerable portion of the subdivisional lines were run by him, (which does not seem to be the case), they were grossly erroneous and worthless as a basis for the disposal of the lands in said township.

Government's Exhibit No. 8—(Continued)

The surrounding surveys executed by other surveyors (Von Schmidt, Gibbs, Henry and Freeman), were found to have been plainly marked, and Reed, had he been disposed to make a correct survey, would have experienced no difficulty in making proper connections with the previously established lines.

In regard to the hiatus existing between the north boundary of T. 30 S., R. 20 E., as established by Deputy James E. Freeman, and the erroneous line partially marked by Deputy John Reed for the south boundary of T. 29 S., R. 20 E., it is apparent that if an independent additional survey were made covering the same, there would be a deficiency of about twenty chains in north and south measurement in T. 29 S., R. 20 E., between the Reed line and the 7th standard parallel which forms the north boundary of said township.

Under the circumstances of the case as developed by the field examination, I am of the opinion that a resurvey should not be made on the lines of the fraudulent Reed survey, neither should the hiatus between the Reed and Freeman lines be embraced in an additional survey. From a full and careful consideration of the case, I conclude that the only proper remedy is a complete resurvey of the township based upon the surveys of Freeman and others made prior to the Reed survey.

You are therefore hereby authorized to enter into

Government's Exhibit No. 8—(Continued)

contract for a resurvey of those portions of the exterior lines and the entire subdivisional survey of T. 29 S., R. 20 E., M. D. M., purported to have been made by Deputy Surveyor, John Reed, said resurveys to be based upon the prior exterior surveys made by Deputy James E. Freeman, A. W. Von Schmidt, C. D. Gibbs and B. M. Henry. The surveys returned by Deputy Reed having been shown by the investigation made by Mr. Fawkner to be fictitious and fraudulent in character should not only be wholly ignored in the extension of the lines of the resurvey but all corners established by said Reed should be obliterated.

As there is every reason to believe from representations heretofore made (See surveyor general's letter of August 1, 1889) that the remainder of the surveys in T. 30 S., R. 20 E. and townships 29 and 30 south, range 21 east, M. D. M. purported to have been executed by Deputy Surveyor John Reed under his contracts dated February 4, 1869, and June 16, 1871, are as fictitious and fraudulent as his work in T. 29 S., R. 20 E., you may likewise enter into contract for a resurvey of all the lines, exterior and subdivisional in said townships which were embraced in the returns made by Deputy Reed under the contracts above named. The exterior and subdivisional lines established by Deputies Henry and Freeman made prior to the Reed surveys must be recognized and adopted as the basis for the resurveys, and all corners established by

Government's Exhibit No. 8—(Continued)

Reed which may be found out of the proper position relative to the Henry and Freeman surveys should be destroyed.

In case the resurveys herein authorized cannot be contracted for at the minimum and intermediate rates allowed by law you will advertise for bids in accordance with departmental requirements of December, 1891. The cost of said resurveys will be chargeable to the apportionment to your district for the current fiscal year.

For your further information, I send you, in a separate package, Mr. Fawkner's report, field notes, and diagram, which you will please return to the files of this office, when you shall have examined the same.

Very respectfully,

/s/ Indistinguishable,

Assistant Commissioner.

Received in evidence April 26, 1948.

The Clerk: Do you have another exhibit?

Mr. Critchlow: No.

The Court: The next is Government's Exhibit No. 9.

Mr. Critchlow: Next we offer in evidence, if your Honor please, a document dated December 28, 1892, directed to Howard B. Carpenter, United

States Deputy Surveyor, San Francisco, California, signed by the United States Surveyor General for California, which contains the specific instructions to Mr. Carpenter with reference to a resurvey of Township 29 South, Range 20 East.

The Court: Very well. That will be No. 9.

(The document referred to was received in evidence and marked Government's Exhibit No. 9.)

GOVERNMENT'S EXHIBIT No. 9

No. 984

United States of America

[Seal of The National Archives of the United States—1934.]

The National Archives

To all to whom these presents shall come, Greeting:

I Certify That the annexed copy, or each of the specified number of annexed copies, of each document listed below is a true copy of a document in the official custody of the Archivist of the United States.

Special Instructions from File Identified as California Surveying Contract and Bond 104.

This document is from the records of the General Land Office.

In testimony whereof, I, Solon J. Buck, Archivist of the United States, have hereunto caused the Seal of the National Archives to be affixed and my name subscribed by the Chief or Acting Chief of

the General Reference Division of the National Archives, in the District of Columbia, this 20th day of June, 1947.

/s/ SOLON J. BUCK,

Archivist of the United
States.

[Seal] By /s/ W. NEIL FRANKLIN,

Chief, General Reference
Division.

Department of the Interior,
Office of the U. S. Surveyor General,
District of California

Referring to letter from S. G. January 4, 1893,
re to report by Fawkner, and affirming the S. G.
findings the instructions are considered correct.

/s/ W. M. J.

San Francisco, Cal.
December 28, 1892.

Howard B. Carpenter,
U. S. Deputy Surveyor,
San Francisco, Cal.

Sir:

In the execution of the remaining surveys of the public lands in townships 29 and 30 south, ranges 20 and 21 east, township 28 south, range 20 east, township 30 south, range 22 East, M.D.M., under your contract of December 28, 1892, you will proceed in the manner prescribed in the Manual of

Surveys of January 1, 1890, following the directions as noted upon the diagram herewith furnished you and which are made a part of these special instructions.

Under contract of February 4, 1869, and June 16, 1871, John Reed, deputy surveyor, returned to this office field notes of an alleged survey of the completion of the townships 29 and 30 south, ranges 20 and 21 east.

Recent examinations have demonstrated said surveys to be erroneous and fraudulent. You will therefore proceed to make a new survey of the lines indicated on the diagram in red, disregarding the Reed surveys, but recognizing the surveys of Von Schmidt, Gibbs, Freeman, and Henry as authentic, and making them a basis for starting and closing your work, in accordance with the findings of Department letter "E", dated November 29, 1892.

You will obliterate the lines and corners made by Reed in said fraudulent surveys, but will carefully locate any improvements or well defined claims of settlers indicated by fences or monuments in order that they may be shown upon the plats of the townships as a basis for adjustment, but before destroying Reed's corners as directed, you will ascertain their relation to your own surveys by bearing and distance. For the survey and location of these claims you will be paid at the same rate of compensation as provided for in your contract.

You will make only such retracements and re-

surveys of former approved official surveys as may be found to be absolutely essential to the proper completion of the new surveys as authorized, for which work you will be allowed the same rates of mileage as those named in your contract.

The lines of original approved surveys which are resurveyed in order to establish your beginning or closing points, must be specifically described in the field notes of your new surveys, and the necessity therefor clearly set forth, showing that such surveys have been obliterated, and also that a faithful search has been made therefor.

Great care must be exercised in order to prevent if possible needless retracements or resurveys; hence the requirements for detailed statements of the necessity and search for lines in question; all of which information must be embodied in the field notes of the surveys provided for in your contract.

Describe carefully the character of the land over which each mile runs, that there may be no misunderstanding in the final adjustment of your accounts.

Copies of the field notes of the approved surveys, upon which you will begin and close your work, will be furnished you.

Upon the completion of your work in the field, you will return the sworn field notes thereof, together with a topographical sketch of your surveys to this office. Your attention is particularly directed to the diagram, as it is believed that it represents very approximately the relative position of

the Von Schmidt surveys on the north, and the Freeman surveys on the south, and it is recommended that you first survey all of the exterior lines required to show the connection between said former surveys, and should they differ materially, you will report to this office and receive further instructions.

Very respectfully,

/s/ WM. M. PRATT,

U.S. Surveyor General
for California.

Received in evidence April 26, 1948.

Mr. Critchlow: I call your attention to the fact, if your Honor please, that in those instructions, while Carpenter is directed to obliterate the Reed monuments, he is also directed to record the position of those monuments by course and distance wherever he finds them.

The Court: You mean the statement "you will ascertain their relation to your own surveys by bearing and distance"?

Mr. Critchlow: That is correct.

The Court: But he states here that he "will carefully locate any improvements or well-defined claims of settlers indicated by fences or monuments."

Mr. Critchlow: Yes.

The Court: Very well. That is No. 9 in evidence.

Mr Critchlow: Next we offer as plaintiff's Exhibit No. 10, a certified copy of the field notes executed by Howard B. Carpenter of his survey of Township 29 South, Range 20 East, in so far as they relate to Section 36.

The Clerk: Government's Exhibit 10 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 10.)

The Court: That is only in so far as it relates to Section 36?

Mr. Critchlow: Yes, your Honor please. The entire Carpenter survey of the whole township would cover all of the sections in that township and in our opinion would have no bearing upon this case.

Next we offer in evidence plaintiff's exhibit No. 11, a certified copy of the plat of Township 29 South, Range 20 East, of the Carpenter survey, the plat having been approved by the United States Surveyor General of California November 18, 1893.

The Clerk: Government's Exhibit 11 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 11.)

[Government's Exhibit No. 11 is identical to Exhibit B attached to the Complaint. See page 13 of this printed record.]

The Court: Is the old Section 36 indicated on here?

Mr. Critchlow: Only indirectly, not specifically as such. You can note the three corners of it are shown, the southwest, the northwest and the northeast corners are shown in that plat and referred to.

The Court: Looking at this map now, and I myself having an interest in an oil and gas prospecting permit, I do not know whether that would disqualify me in this case or not. I seem to recognize it from this map. Is this what they called the old Temblor?

Mr. Critchlow: It is in that general vicinity, the general vicinity of the Temblor field.

Mr. Clark: In the vicinity of what?

The Court: What they called the old Temblor.

Mr. Clark: Yes, I think it is, your Honor

The Court: The old Temblor ranch house.

Mr. Clark: I suppose the defendants can waive anything of that kind, if it is troubling the Court. We would certainly be willing to do it on the record right now.

Mr. Critchlow: I may say this, there were a number of leases executed by Miller and Lux, these people, on this whole Section 36.

The Court: The oil and gas prospecting permit here went around—this was all in withdrawal lands?

Mr. Clark: These were not withdrawal lands.

The Court: Were these not included in the Pickett withdrawals and the Taft withdrawals?

Mr. Clark: No, they have never been included in the Taft 1909 law.

Mr. Critchlow: There were two prospecting permits issued, I believe.

The Court: Who were they issued to?

Mr. Critchlow: I think I have them here. There was one issued to Morris Cohen.

The Court: Yes, he was my client.

Mr. Critchlow: And one issued to Margaret C. Rutherford.

The Court: Morris Cohen was first in point of time and that was issued in 1920.

Mr. Critchlow: It was issued in 1920, reissued in May 1921 and it was canceled and reinstated and then finally canceled out.

The Court: When was it finally canceled?

Mr. Critchlow: I would have to go over these other papers, your Honor please. It doesn't show on this.

The Court: Let me see that a moment.

(The document referred to was passed to the Court.)

The Court: This was Lots 1, 2 and 3 of Section 25, Lots 1, 2, 3, 4 and 5 of the northwest quarter of the northeast quarter, west half of the east half, southeast quarter of the southeast quarter, east half of the southwest quarter of Section 34, Lot 7 in Section 35, Lots 2 and 11 inclusive in Section 36.

Mr. Critchlow: Lots 2 to 11 inclusive, your Honor please, is this area here. (indicating on black-board.) It is outside the boundaries of the old Section 36 by a segregation survey made by Wilkes, which is our next exhibit.

The Court: I was Morris Cohen's attorney. I

filed the application for a permit for him and had a contingent interest in it. As a matter of fact, I think I put up the filing fee myself, and represented him at all times and prepared all the papers which he filed with the General Land Office in connection with the matter. I remember that it was canceled and reinstated but I had forgotten now—when did you say it was finally canceled?

Mr. Critchlow: Maybe I can find it here. There was a failure to drill. That is my recollection of it.

The Court: That is right.

Mr. Critchlow: What is that number, your Honor?

The Court: 09237, Visalia. I do not think it ever got a Sacramento number. It might have. They moved the land office up there, I had forgotten when.

Mr. Clark: It occurs to me, if the Court please, that if litigant permit matters of that kind to bother them very much we would never get any lawsuits tried in California by the younger members of the bench at any rate. I don't want to embarrass Mr. Critchlow by making this suggestion, but I think it ought to be waived. We are willing to waive it.

The Court: Of necessity in the filing of a permit I would have to take the position that the land was subject to a prospecting permit.

Mr. Clark: I don't think there is anything to it one way or the other. We are perfectly willing to waive it, and we do waive it on the record.

Mr. Critchlow: The Government is perfectly willing to waive it on the record also.

Mr. Clark: Mr. Justice Wilbur used to embarrass me a great deal in the Circuit Court of Appeals about 30 years ago, when he represented a claim against the Honolulu Oil Company which resulted in some \$300,000 litigation. I never appeared before him after that but he didn't ask me who was involved in it, as he was so afraid that he would become disqualified in some way.

The Court: I am sorry, gentlemen, that I did not notice this before. I vaguely knew that general area because I had filed a great many applications for permits in connection with oil land matters but I did not recognize it until I saw this map. If that is the map that was attached to the complaint, it shows what a poor copy it was because I couldn't tell anything by the one that was attached to the complaint here.

Mr. Critchlow: That would be Exhibit B to the complaint.

The Court: I looked at that but I did not recognize it. I recognized it immediately here because this is the same size as the maps in the land office, isn't that correct?

Mr. Critchlow: Yes, that is a copy from the land office.

The Court: I traced all these lots off here.

Well, I don't want anyone to feel as though he is under any necessity of making any waiver. I do not feel conscious of any prejudice towards one view or the other in this case.

Mr. Critchlow: The Government is perfectly

satisfied that your Honor is not and could not be prejudiced one way or the other.

Mr. Clark: The defendants are satisfied. We will put the waiver in any form that Mr. Critchlow and I agree upon. It can be taken right in the record now.

The Court: Very well.

Mr. Clark: The Court suggested the possibility and we have waived it, if there is a possibility. We don't know, but even if there is one, we will waive it.

The Court: Do you agree?

Mr. Critchlow: That is agreed to.

The Court: Very well. No. 11 will be admitted.

Mr. Critchlow: Now, if your Honor please, I have here under one certificate 21 papers which were filed in connection with a file in the General Land Office called California Group 11. There are only five of them which I think have any direct bearing on this case, so if it is satisfactory with counsel I am going to ask that this certificate be detached—they are all under one certificate—so that I can offer merely the documents which I think are material.

The Court: Why not mark the whole thing for identification and then offer the ones that you want to in evidence and subsequently detach them? Do you know which ones they are now?

Mr. Critchlow: Yes.

The Court: No. 12 will be marked for identification and those in evidence will be 12-A, B, C, D and E.

Mr. Critchlow: No. 12 for identification is a file of documents under one certificate from the archives division, the documents being identified as from a file identified as California Group 11.

The various documents are tabbed on the left-hand border by numbers running from 1 to 21. The tabbing is done in my office and is not a part of the certificate.

(The file referred to was marked Government's Exhibit No. 12 for identification.)

The Court: Which ones do you want to put in evidence?

Mr. Critchlow: I want to offer the document which is tabbed No. 1. That is a letter under date of March 25, 1912, addressed to the Commissioner of the General Land Office and signed by W. S. Kingsbury, State Surveyor General.

The Court: 12-A in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 12-A.)

Tab. 1.

GOVERNMENT'S EXHIBIT No. 12-A

State of California

Cal. files.

Ans'd Apr 15/12

Office of
Surveyor-General
and
Register State Land Office

Sacramento, March 25, 1912.

Inquiry regarding Cert. Survey

Honorable Commissioner of the General Land
Office, Washington, D. C.

Dear Sir:—

T. 29 S., R. 20 E., M. D. M., was surveyed in 1869 by John Reed and the plat thereof was approved April 27, 1869.

April 15, 1872 the Register of the United States Land Office at Visalia certified that the plat of said township had been on file in his office over ninety days, that the SW $\frac{1}{4}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ and SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 36, were pre-empted and that the balance of the section was clear.

Upon the approval and the filing of the plat of said township the title to the unencumbered portion of Section 36, as surveyed by Reed, vested in the State of California, and said portion was sold by and patented by the State.

Another survey of T. 29 S., R. 20 E., was made by H. B. Carpenter in 1893 and the plat thereof

was approved November 18, 1893. On said plat are shown the N.E., N.W., and S.W. corners of Section 36 as set by John Reed in 1869, but said corners were not adopted by Carpenter in his survey and portions of said Section 36, the title to which vested in the State under the Reed survey are now, according to the Carpenter survey, parts of Sections 25, 26 and 35, and the identity of Section 36 as surveyed by Reed and to which the State claims title, has been destroyed.

Will you kindly advise this office why the identity of Section 36 as surveyed by Reed was not preserved when the Carpenter survey was made and what your department will do to perfect the State's title to Section 36 as surveyed in 1869?

Yours respectfully,

/s/ W. S. KINGSBURY,

State Surveyor General.

Received in evidence April 26, 1948.

Mr. Critchlow: The document tabbed as No. 2, which is a letter dated April 15, 1912, addressed to W. S. Kingsbury from the General Land Office.

The Court: 12-B.

(The document referred to was received in evidence and marked Government's Exhibit No. 12-B.)

Tab. 2.

GOVERNMENT'S EXHIBIT No. 12-B

In Reply Please Refer to 224632 "E" W.T.P.
W.T.P.

Department of the Interior
General Land Office
Washington

April 15, 1912.

Surveys in T. 29 S., R. 20 E., M.D.M., California.

Mr. W. S. Kingsbury,
State Surveyor General,
Sacramento, California.

Sir:

In your letter dated March 25, 1912, you call attention to the surveys in T. 29 S., R. 20 E., M.D.M., and request information on certain phases relating to the legal status of the State's claim to sec. 36 of said township.

The records of this office show that the said township was subdivided in 1869 and the plat was approved April 27, 1869. From your letter it appears that on April 15, 1872, the Register of the U. S. Land Office at Visalia certified that the plat of said township had been on file in his office over ninety days and that the SW $\frac{1}{4}$ NW $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$ of sec. 36 were preempted and that the balance of the section was clear.

The records here confirm the preemption entry described and indicates that the plat was filed in the local office May 28, 1869.

The lands in said township were open to disposal from that date until November 30, 1892, when the same were suspended from all disposals, in view of the resurveys authorized by letter "E" dated November 29, 1892, addressed to the U. S. Surveyor General, setting forth the conclusions relative to the survey of said township by John Reed, in 1869, as developed by a final examination as follows:

"I am of the opinion that a resurvey should not be made on the lines of the fraudulent Reed survey, neither should the hiatus between the Reed and Freeman lines be embraced in an additional survey. From a full and careful consideration of the case, I conclude that the only proper remedy is a complete resurvey of the township based upon the surveys of Freeman and others made prior to the Reed survey.

You are therefore hereby authorized to enter into contract for a resurvey of those portions of the exterior lines and the entire subdivisional survey of T. 29 S., R. 20 E., M.D.M., purported to have been made by Deputy Surveyor, John Reed, said resurveys to be based upon the prior exterior surveys made by Deputy James E. Freeman, A. W. Von Schmidt, C. D. Gibbs and B. M. Henry. The surveys returned by Deputy Reed having been shown by the investigation made by Mr. Fawcner to be fictitious and fraudulent in character should not only be wholly ignored in the extension of the lines of the resurvey but all corners established by said Reed should be obliterated."

This action was followed by a resurvey in accord-

ance with instructions from the U. S. Surveyor General, in which the deputy surveyor, after being directed to proceed with a new survey of the township disregarding the Reed corners, was instructed to obliterate the Reed corners, but to carefully locate improvements or well defined claims of settlers indicated by fences or monuments in order that they might be shown upon the new plat of the township as a basis of adjustment, after ascertaining the relation of Reed's corners to the new survey by bearing and distance. These instructions appear to have been observed by the deputy including the locations of the NE, NW and SW corners of Reed's survey of sec. 36, incidental only, however, to the locations of certain claims in adjacent sections 25, 26 and 35; he appears not to have been impressed with the fact either that a patent had been issued for 160 acres under a preemption entry in sec. 36 or that any necessity existed for the observance of the fact that the title of the remaining 480 acres had vested in the State under the school land law. He seems to have found a number of corners based upon certain approved State Selections in secs. 25, 26 and 35, as well as a preemption entry patented in 1889 in sec. 35. The corners of certain unapproved State Selections were also noted, but there appears to have been no impression made of the necessity or advisability of his preserving and recognizing the identity of sec. 36 as surveyed by Reed. The only conclusion at which this office can now arrive is that in 1893 when the plat of resurvey was constructed, a section

36 was shown thereon by the new survey and that it was assumed that the State would adjust its claim thereto.

Without attempting at this time to determine the question presented by you as to what the Department will do to perfect the State's title to section 36 as surveyed in 1869, these facts are placed before you for such further action as the State may wish to take in the matter.

Very respectfully,

/s/ [Indistinguishable]

Commissioner.

4-13 F/S

Received in evidence April 26, 1948.

Mr. Critchlow: The next item is tab No. 3, which is a letter dated May 7, 1912, addressed to the Honorable Commissioner of the General Land Office, signed by W. S. Kingsbury, State Surveyor General and Ex-officio Registrar of the State Land Office.

The Court: 12-C.

(The document referred to was received in evidence and marked Government's Exhibit No. 12-C.)



State of California

*Recd May 17/12
H. S. Kingbury*

A. W. SANBORN
DEPUTY

OFFICE OF
SURVEYOR-GENERAL

AND
REGISTER STATE LAND OFFICE

224632
Received G.L.O. MAY 14 1912
Referred to
Assistant
Surveyor

224632
Sacramento, May 7, 1912.

Honorable Commissioner of the General Land Office,
Washington, D. C.

Dear Sir:-

Referring to your favor 224632 "E" W.T.P. of April 15, 1912, concerning Section 36, T. 29 S., R. 20 E., M.D.M., the State of California respectfully requests you to construct a township plat and delineate thereon Section 36 as surveyed by John Reed in 1869, being the land the title to which vested in the State of California upon approval of said survey, which title the State disposed of through patents issued under the laws of the State.

This office is not advised by the General Land Office when a township is surveyed or resurveyed, therefore, when a resurvey is made, in some instances many years elapse before the State discovers that a new survey of a township has been made, which in this case, is the reason for this belated request to show the locus of said Section 36, as surveyed in 1869. The State cannot adjust its claim to a school section located by a resurvey, in a position different from the one originally established, to which the State's title vested.

Yours respectfully,

H. S. Kingbury
State Surveyor General and ex officio Register of State Land Office.

Mr. Critchlow: The next is the item tabbed in this file as No. 5, which is a letter dated May 17, 1912, addressed to Mr. W. S. Kingsbury, State Surveyor General, Sacramento, California, signed by S. V. Proudfit, Commissioner.

The Court: That will be 12-D.

(The document referred to was received in evidence and marked Government's Exhibit No. 12-D.)

Tab 5.

GOVERNMENT'S EXHIBIT No. 12-D

In Reply Please Refer to "E" 224632 W.T.P.
W.T.P.

Department of the Interior

General Land Office

Washington, May 17, 1912.

Surveys in T. 29 S., R. 20 E., M.D.M., California.

Mr. W. S. Kingsbury,
State Surveyor General,
Sacramento, California.

Sir:

I am in receipt of your letter dated May 7, 1912, requesting the construction of a township plat showing sec. 36, T. 29 S., R. 20 E., M.D.M., California, as surveyed by John Reed in 1869, the same being the land the title to which vested in the State of California upon approval of said survey, which title, it is said, the State disposed of through patents issued under the laws thereof.

In reply, you are advised that as stated in letter

“E” to you dated April 15, 1912, the deputy surveyor in the resurvey of 1893, located the N.E., N.W. and S.W. corners of deputy Reed’s survey of sec. 36, incidental only, however, to the location of certain claims in secs. 25, 26 and 35. He appears not to have located the southeast corner of said sec. 36 and before a plat can be constructed which will show sec. 36 as originally surveyed, said southeast corner must be located and marked upon the ground and the boundaries of the resurveyed section defined with reference to the surrounding lands.

Instructions for such survey will be prepared by the U. S. Surveyor General, San Francisco, California, to whom the matter has been referred.

Very respectfully,

/s/ S. V. PROUDFIT,

Commissioner.

5-15 FAS

Mr. Critchlow: The next item tabbed in the file is No. 6, which is a copy—may I speak to counsel for just a moment?

The Court: Surely.

(Conference between counsel.)

Mr. Critchlow: Apparently it is a copy of the draft of the instructions of Deputy Surveyor Wilkes with reference to a segregation survey of the area which we are concerned with in this case. It bears the date September 10, 1912, but the name of the surveyor to whom they are addressed doesn’t appear

in this document. They are, however, signed by E. H. Archer, United States Surveyor General for California.

Mr. Clark: I think as a matter of record that I ought to object to the introduction of anything that relates to a survey subsequent to the Carpenter survey of the area that is involved in this litigation, on the ground that there was no authority in the Government to have such survey made for the purpose of intermeddling with any prior approved survey or intermeddling with anybody's title. I think the cases are uniform on that. It would be irrelevant and incompetent here also.

I have no objection to the material being introduced and being placed in the record, subject to that objection. I just want it clear that it shan't be used for the purpose of showing that there was any change in the Carpenter survey.

The Court: Your point is that there is no foundation?

Mr. Clark: No. What happened was this——

The Court: Then your objection goes rather to the effect of it than to its admissibility?

Mr. Clark: That is right.

The Court: Very well. It will be admitted.

Mr. Clark: It wouldn't be competent for the purpose of changing what had already happened. All either one of us wants it for is to illustrate what had happened.

The Court: It is in evidence. I understand your objection goes to the effect of it.

Mr. Clark: That is right, to its legal effect.

The Clerk: That is Government's Exhibit 12-E.

(The document referred to was received in evidence and marked Government's Exhibit No. 12-E.)

Tab 6.

GOVERNMENT'S EXHIBIT No. 12-E

Group II

Department of the Interior,
Office of the U. S. Surveyor General
San Francisco, California,

J.M.W.

Sept. 10, 1912.

.....

U. S. Surveyor,

Sir:

John Reed, under his contract dated February 4, 1869, subdivided T. 29 S. R. 20 E., M.D.M., California, the plat of which was approved April 27, 1869, and filed in the Visalia Land Office May 28, 1869, but on November 30, 1892, said survey was suspended. Prior to said suspension a number of entries were made and lands patented according to the Reed survey.

H. B. Carpenter, under his contract dated December 28, 1892, resurveyed the above township and located all patented lands relative to said survey; he failed to survey out, by metes and bounds, original section 36 of said township, but did show and locate the NW, N.E. and S.W. and probably the

Government's Exhibit No. 12-E—(Continued)

West quarter section corners, as established by Deputy Reed. All of the land in said section 36 belonged to the state of California and was disposed of through patents issued under the laws thereof, according to the Reed survey.

You are therefore directed to make a supplemental survey of original section 36, T. 29 S. R. 20 E., as surveyed by Deputy Reed in 1869, which will re-locate the three corners reported by deputy Carpenter in 1893 and in addition the Southeast corner of said section as established by Reed.

If all evidences of the original South East corner have disappeared, it may be restored by reference to the evidences which existed in 1893 as to its being at the intersection of two lines run from the N.E. and S.W. corners, the former on a course South $1^{\circ} 16'$ W. and the latter, South $88^{\circ} 44'$ E. which seems to have been the courses of Reed's lines reported by deputy Carpenter.

Begin your supplemental survey at Reed's old corner of secs. 1, 2, 35 and 36 reported by deputy Carpenter to be West 14.01 chains from a point on the line between secs. 35 and 36 N. $0^{\circ} 47'$ W. 34.00 chs. distant from the cor. of secs 35 and 36, on South boundary of township.

Thence run North $1^{\circ} 16'$ E. along the West boundary of original section 36; at 20.00 chs. note falling of the N.E. cor. of Thos. E. Frazier's patented land, being the S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 35 (Reed survey). Should the cor be missing, set temporary cor. In the same

Government's Exhibit No. 12-E—(Continued)
manner note falling from the N.E. cor. of E. M. Crocker's tract, being the N.E. $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 35 (or $\frac{1}{4}$ sec. cor. between secs. 35 and 36 (Reed's survey).

At 80.00 chs. set temp. $\frac{1}{4}$ $\frac{1}{4}$ sec. cor. for the N.W. cor. of SW $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 36. Continue on random line to Reed's old corner of 25, 26, 35 and 36, which cor. Is reported by Deputy Carpenter to be N.88° 44' W. 11.13 chs. from a point on line between secs 25 and 26, N. 0°47' W. 34.26 chs. from the cor. of secs. 25, 26, 35 and 36 (Carpenter resurvey). If you find the $\frac{1}{4}$ sec. cor. and the two $\frac{1}{4}$ $\frac{1}{4}$ cors. on your random line, return on a true line, giving course and distance between consecutive corners, so found. Should you fail to find part or all of the above corners re-establish the missing corners at proportionate distances.

In the same manner, you will retrace or resurvey the North boundary of original sec. 36 between the N.W. and N.E. corners thereof by first running a random line from the N.W. cor. to the N.E. cor. which cor is reported by Deputy Carpenter to be N. 88° 44' W. 6.13 chs. from a point on West boundary of T. 29 S. R. 21 E., S. 0° 47' E. 64.94 chs. from the cor. of secs. 19 and 30. Thence Westerly on a true line re-establishing the two $\frac{1}{4}$ $\frac{1}{4}$ sec. and $\frac{1}{4}$ sec. cors, if lost or obliterated, at proportionate distances.

From Reed's old cor. of secs. 25, 30, 31 and 36 run S. 1° 16' W on a random line on the East boundary of sec. 36, (Reed's survey), also the West

Government's Exhibit No. 12-E—(Continued)

boundary of A. N. Foster's tract, the S.W. cor. of which is reported by Carpenter to be N. $88^{\circ} 44'$ W., 6.83 chs. from a point on the West boundary of T. 29 S. R. 21 E., at S. $0^{\circ} 47'$ E., 4.94 chs. from the cor. of secs. 30 and 31; thence continue on random to the S.W. cor. of C. C. Bishop's tract which cor. is reported by Carpenter as being N. $88^{\circ} 44'$ W. 7.52 chs. from a point on West boundary of T. 29 S., R. 21 E., at $8.0^{\circ} 47'$ E., 24.94 chs. from the cor. of secs. 30 and 31.

This cor. is the East $\frac{1}{4}$ sec. cor. sec. 36 (Reed's survey) Continue S. $1^{\circ} 16'$ W. on a random line to the S.E. cor. of sec. 36. Thence back on true line, re-establishing the $\frac{1}{4}$ and $\frac{1}{4} \frac{1}{4}$ sec. cors. if missing at proportionate distances. Should you fail to find the S.E. cor. of sec. 36 you will re-establish it at the mutual intersection of the line run S. $88^{\circ} 44'$ E. from the cor. of secs. 1, 2, 35 and 36 and the line run S. $1^{\circ} 16'$ W. from the cor. of secs. 25, 30, 31 and 36. Should you find the east $\frac{1}{4}$ sec. cor. sec. 36, then you will run S. $1^{\circ} 16'$ W. from that cor. instead of from Reed's old. cor. of secs. 25, 30, 31 and 36.

At said intersection, re-establish the S.E. cor. of original sec. 36.

Re-establish the South $\frac{1}{4}$ sec. cor. sec. 36 midway between the S.E. and S.W. corners. Establish the $\frac{1}{4} \frac{1}{4}$ sec. cor., or the S.E. cor. of the $SW\frac{1}{4}$ $SW\frac{1}{4}$ mid-way between the S.W. cor. and the re-established $\frac{1}{4}$ sec. cor., sec. 36.

Having re-established the four quarter section

Government's Exhibit No. 12-E—(Continued)
corners you will subdivide sec. 36 into its component parts, with reference to such of the subdivisional lines as may be necessary to identify the corners of lands patented to Edwin M. Crocker, embracing the SW $\frac{1}{4}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ of SW $\frac{1}{4}$ and SW $\frac{1}{4}$ SW $\frac{1}{4}$. Subdivision to be made in accordance with sec. 74 et seq. page 21 of circular entitled "Restoration of Lost or Obliterated Corners and Subdivision of Sections" Revision of June 1, 1909.

You will also subdivide the SW $\frac{1}{4}$ and NW $\frac{1}{4}$ into their component parts establishing $\frac{1}{4}$ $\frac{1}{4}$ sec. cors., indicated on accompanying blue blue print.

At the points of intersection of the South boundary of sec. 36 (Reeds Survey) and the line between sec. 35 and 36 (Carpenter Survey) give bearing and distance to the cor. of sec. 35 and 36 of S. Bdy. of township and the $\frac{1}{4}$ sec. cor. for same secs. and establish closing cor. thereon. In like manner give intersections for the E.N. and W. boundaries of original sec. 36 with public land lines, as re-surveyed by deputy Carpenter but do not establish closing cors.

Corners will consist of best native stone if obtainable, if not, then use good sound post. Wood of a perishable nature will not be used. Mark and witness by the usual accessories. The interior $\frac{1}{4}$ and $\frac{1}{4}$ $\frac{1}{4}$ sec. cors will be set and marked as for $\frac{1}{4}$ sec. cors. on meridional lines.

Before leaving the field see that all closed figures formed with accepted or retraced boundaries close.

Government's Exhibit No. 12-E—(Continued)
within limits. This may necessitate a limited re-tracement of the public land lines as re-surveyed by Carpenter.

If at any stage of your work you find the conditions of the old surveys different from those shown on blue print or as described in original field notes, you will report the facts to this office and await further instructions.

Upon completion of the supplemental survey, you will prepare the returns of the survey, which must conform with the requirements of the Manual of 1902, and file the same—in this office.

For your information and guidance, the following data is herewith furnished; viz,

One blue print diagram indicating work to be performed.

Transcript of field notes of the Reed Survey.

Transcript of field notes of the Carpenter re-survey, and

Circular on the "Restoration of Lost or Obliterated Corners and Subdivision of Sections".

Very respectfully,

/s/ E. H. ARCHER,

U. S. Surveyor General
for California.

Received in evidence April 26, 1948.

The Court: Exhibits 12-A, B, C, D and E, being respectively tabs 1, 2, 3, 5 and 6, are in evidence, and the remainder of Exhibit 12 is marked for identification.

Mr. Critchlow: Now as Exhibit 13 we offer in evidence a certified copy of the field notes of survey by Lincoln E. Wilkes, in so far as they relate to Section 36.

Mr. Clark: No objection, except to its legal effect.

The Court: What is the date of it?

Mr. Critchlow: The survey was commenced January 13, 1914 and completed January 18, 1914. This is the field notes themselves.

The Court: That is sufficient to identify it. There will be the same ruling as Exhibit 12-E.

The Clerk: Government's Exhibit 13 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 13.)

Mr. Critchlow: The next exhibit is a certified copy of the plat of the Wilkes' survey, certified by the United States Surveyor General for California under date of April 7, 1915.

The Court: Same ruling.

The Clerk: Government's Exhibit 14 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 14.)

[Government's Exhibit No. 14 is identical to Ex-

hibit C attached to the Complaint. See page 14 of this printed record.]

Mr. Clark: I might state there, if I may, in your memorandum filed with the Court, a copy of which you sent to me, you gave the impression that the area surveyed in the Wilkes' survey contained 303 acres. If you will add that or put it on an adding machine tape and add the area marked Carpenter on there, on the south and east, you will find that that is the area that contains 303 acres and not the entire square.

What I am trying to say is this, this L-shaped area here adds on the adding machine to 303 acres. Mr. Critchlow's memorandum gave me the impression at any rate that he thought the whole square here contained 303 acres.

The Court: The Wilkes' survey is a survey of only a portion of Section 36?

Mr. Clark: Yes.

Mr. Critchlow: No.

The Court: This is where the Lots 2 to 11 came in?

Mr. Clark: That is right. Wilkes tried to find out what had happened.

Mr. Critchlow: He was directed to segregate the area of Section 36 by Reed, which he did by calling it Tract 89, and then this area was divided into lots numbered 1 to 11. The segregation survey was made at the request of the State of California, as evidenced by the documents Exhibits 12-A, B, C, D and E.

The Court: All this does is assign lot numbers to that area you have marked on the board as Carpenter's?

Mr. Critchlow: That is right. And if you will read the statement up at the side, if your Honor please, this purports to identify it as Tract 69, this area surveyed by Reed as Section 36. In other words, it places that designation, Tract 69, on the area surveyed by Reed in 1869.

Mr. Clark: I am inclined to dispute that. I don't think it refers to the whole of Reed's survey as Tract 69.

The Court: This does not change anything from the Carpenter survey, does it?

Mr. Clark: It cannot.

The Court: It does not purport to except to draw some lines. Instead of an unidentified piece of ground, so many chains and rods and the like in this direction and that direction from the points of the compass, it is Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.

Mr. Critchlow: I don't quite agree with that, if your Honor please, because while the Carpenter survey identified the location of this corner, that is, the southwest corner, northwest corner and northeast corner of Reed's Section 36, the Carpenter survey did not identify the location of the southeast corner.

The Court: As far as the Carpenter survey is concerned, the southeast corner is way down there in the southwest corner of Carpenter's, as far as this plat is concerned.

Mr. Critchlow: I don't quite agree with that.

The Court: As far as it appears on the face of this document.

Mr. Critchlow: It doesn't show the south line of the section, Reed's Section 36, nor does it show a part of the east line.

Now the correspondence which has been offered under Exhibits 12-A, 12-B and 12-C show the reason for the Wilkes' survey, which was to show on a plat this area and described as such. That was the reason for it. That is what was done.

The Court: Very well. Exhibit 14 is in evidence, subject to the same objection and same ruling as was made to 12-E.

(The document referred to was received in evidence and marked Government's Exhibit No. 14.)

Mr. Critchlow: Now, if your Honor please, we are going into the Jordan situation. I will ask to be marked for identification a certified copy of a petition for writ of mandamus in the case of Jordan v. Kingsbury as Surveyor General, entitled In the Superior Court of the State of California, in and for the City and County of San Francisco——

Mr. Clark: I can shorten that for you. I have a transcript of the appeal in that case.

Mr. Critchlow: I don't care about the testimony.

Mr. Clark: There is only one part of the testimony that I would want in the case.

The Court: Have you seen that, Mr. Critchlow?

Mr. Critchlow: No.

The Court: Why do you not look at it?

Mr. Critchlow: Very well.

The Court: You look at it and we will have a recess.

(Short recess.)

Mr. Critchlow: I have in my hand a copy of a transcript entitled In the District Court of Appeals of the State of California, in and for the First Appellate District, in the Case of J. H. Jordan v. W. S. Kingsbury, as Surveyor General and Registrar of the State Land Office of the State of California, and is denominated Transcript on Appeal. May that be marked as Exhibit 16.

The Clerk: Government's Exhibit No. 16 in evidence.

Mr. Critchlow: Just a minute. I do not offer the whole document.

The Court: It will be No. 16 for identification and then you can mark it 16-A, B and C.

(The document referred to was marked Government's Exhibit No. 16 for identification.)

The Court: 16-A will be what, the petition?

Mr. Critchlow: The petition for the writ of mandamus, filed in the Superior Court, beginning on page 3.

(The document referred to was received in evidence and marked Government's Exhibit No. 16-A.)

GOVERNMENT'S EXHIBIT NO. 16-A

In the Supreme Court of the State of California
Transcript on Appeal

In the Superior Court of the State of California, in
and for the City and County of San Francisco.

J. H. JORDAN,

Petitioner,

vs.

W. S. KINGSBURY, as Surveyor General and
Register of the State Land Office of the State
of California,

Respondent.

Complaint

The petition of the above named petitioner, J. H. Jordan, to the Honorable the Superior Court of the State of California in and for the City and County of San Francisco, sheweth:

I.

That your petitioner is, and at all times hereinafter mentioned was, a citizen of the United States of America, and of the State of California, and over the age of twenty-one (21) years.

II.

That the respondent is, and at all the times hereinafter referred to was, the Surveyor General and Register of the State Land Office of the State of California.

Government's Exhibit No. 16-A—(Continued)

III.

That on the 22nd day of March, 1912, at the office of respondent in the Capitol Building, in the City of Sacramento, and State of California, your petitioner did present to respondent, as such Surveyor General and Register of the State Land Office, for filing, a written application for the purchase of the school lands in said application described, that is to say, for the following described land in Kern County, to wit:

The South one-half ($1/2$) and the Northeast one-quarter ($1/4$) of Section Thirty-six (36), Township Twenty-nine (29) South, of Range Twenty (20) East, Mount Diablo Meridian, according to the official survey thereof made by U. S. Deputy Surveyor Carpenter, approved November 18, 1893, containing Four hundred and eighty (480) acres;

that said application was accompanied by the affidavit of petitioner to the effect that he was a citizen of the United States, a resident of this State of legal age, that he desired to purchase the said lands (describing them by legal subdivisions as hereinabove set forth) under the provisions of title eight of the Political Code, for his own use and benefit, and for the use and benefit of no other person whomsoever, and that he had made no contract or agreement to sell the same, and that he did not own any state lands which, together with that then sought to be purchased, exceeded six hundred and

Government's Exhibit No. 16-A—(Continued)
forty (640) acres, all in due form as prescribed by the laws of the State of California and by respondent.

IV.

That at the same time and place, petitioner did likewise present to respondent, as such Surveyor General and Register of the State Land Office, an affidavit by J. B. Batz and V. S. Batz, both of whom were, at all times herein referred to, and still are, citizens of the United States of America, and of the State of California, wherein each did depose and say that he was well acquainted with the said lands, and with each and every legal subdivision thereof; that said lands were not timbered lands; that there was not as much as one-half of any legal subdivision thereof that would produce ordinary agricultural crops in average quantities, by the ordinary processes of tillage, with or without the clearing of timber or other growth therefrom, or without artificial irrigation, and that said lands were principally adapted to grazing purposes, all in due form as prescribed by the laws of the State of California and by respondent.

V.

That at the same time and place, petitioner did likewise deliver to respondent the sum of Twenty-five (25) Dollars, in Gold Coin of the United States, in payment of the filing fee for filing said application, and of the deposit of Twenty (20) Dollars required by law.

Government's Exhibit No. 16-A—(Continued)

VI.

That two surveys of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., were made under the authority of the United States Government; that the first of said surveys was made by one John Reed, a United States Deputy Surveyor, prior to the 27th day of April, 1869, and that the said survey was duly approved by the United States Surveyor General and accepted by the Commissioner of the General Land Office, and a copy of the plat thereof filed in the office of the Register and Receiver of the Land District in which the said lands were situated, on or about the 27th day of April, 1869; that thereupon the said lands contained within said Section Thirty-six (36) did pass to and vest in the State of California as school lands, under the grant of Congress of the Sixteenth and Thirty-sixth sections in each township; that thereafter, as claimed by respondent, and as your petitioner is informed and believes, and according to his information and belief alleges, all of said Section Thirty-six (36), according to said Reed Survey, to which said State of California became entitled under the Act of March 3, 1853, was disposed of by the State of California.

VII.

That thereafter a second survey of said section was made by one H. B. Carpenter, a United States

Government's Exhibit No. 16-A—(Continued)

Deputy Surveyor, prior to the 18th day of November, 1893, and that the said survey was thereafter duly approved by the United States Surveyor General, and accepted by the Commissioner of the General Land Office, on or about the 18th day of November, 1893, and a copy of the plat thereof was thereupon filed in the office of the Register and Receiver of the Land District in which the lands contained within said survey were situated.

VIII.

That the said section, as surveyed by said Carpenter, which said survey is hereinafter referred to as the Carpenter Survey, did not conform with the Reed Survey; that the said Reed Survey, instead of being bounded on the South and East lines thereof by the South and East lines of the township were at some distance therefrom within said township, and that the South and East lines of said section, as surveyed by said Carpenter, were identical, so far as they extended, with the South and East lines of said township; that by reason of the conflict between said surveys, the second of said surveys, to wit: the said Carpenter Survey, contains certain lands which lie without the boundaries of said Reed Survey, and that the said lands so contained within the said Carpenter Survey, and lying outside of the boundary lines of said Reed Survey, did, by virtue of said Carpenter Survey, immediately pass to and vest in the State of Cali-

Government's Exhibit No. 16-A—(Continued)
fornia, as school lands under the grant of Congress of the Sixteenth and Thirty-sixth sections in each township, and that the said lands are contained within the said application of the petitioner herein.

IX.

That respondent did, on said 22nd day of March, 1912, file said application for the said lands, constituting the fractional Northeast one-quarter ($\frac{1}{4}$) and South one-half ($\frac{1}{2}$) of said Section Thirty-six (36), as shown upon the township plat thereof approved November 18, 1893, and hereinabove referred to as the Carpenter Survey.

X.

That thereafter, and during the six (6) months next succeeding the filing of said application, your petitioner did appear before respondent at the time and place fixed by him, pursuant to section 3498, and did answer under oath such interrogatories as were put to him regarding his application and the truth of the same, and the facts and circumstances connected therewith, all as required by the laws of the State of California and by said respondent.

XI.

That said respondent has declined to approve the said application, upon the sole ground that "it does not appear to me" (him) "that the land is subject to sale", and that the said conclusion is based upon a doubt upon the part of respondent as to whether said lands did in fact pass to and vest in the State of California by virtue of said Carpenter Survey.

Government's Exhibit No. 16-A—(Continued)

XII.

That the portion of the lands described in the said application not already disposed of by the State are more particularly described as follows, to wit:

Commencing at the Southeast corner of Section Thirty-six (36), Township Twenty-nine (29) South of Range Twenty (20) East, Mount Diablo Base and Meridian, according to the official plat of the survey thereof, made by United States Deputy Surveyor, H. B. Carpenter and approved by the U. S. Surv. Gen., Cal. November 18, 1893; thence North along the East boundary of said Section Thirty-six (36) as established by said survey, to a point formed by the intersection of the South line of Lot Thirty-seven (37) in said Township and range aforesaid with said East line of said Section; thence West Seven and fifty-two hundredths (7.52) chains more or less, along the South line of said Lot Thirty-seven (37) to a point where said South line of said Lot Thirty-seven (37) intersects the East boundary of said Section thirty-six (36) as said East boundary is shown by plat of survey made by U. S. Deputy Surveyor Reed, approved April 27, 1869; thence South along said East line of said Section thirty-six (36) according to survey last herein referred to, to the Southeast corner of said Section thirty-six (36) according to said last mentioned survey; thence West along the South line of said Section thirty-six (36) as said South line was established by said last named survey to a point where

Government's Exhibit No. 16-A—(Continued)

said south line intersects the West line of said Section thirty-six (36) as said West line was established by U. S. Deputy Surveyor Carpenter according to plat approved November 18, 1893, first herein referred to; thence South along said West line of said Section thirty-six (36) to the Southwest corner of said Section as established by last mentioned survey; thence along the south line of said Section thirty-six (36) according to said survey eighty (80) chains to the place of commencement being all of that portion of section thirty-six (36) lying without the exterior bounds of said Section as established by U. S. Deputy Surveyor Reed and lying within the exterior boundaries of said Section thirty-six (36) as established by U. S. Surveyor Carpenter excepting that portion thereof included within the exterior bounds of Lot Thirty-seven (37), reference being hereby made to the official plats of said surveys herein referred to for further particulars.

That the said lands contain 301.38 acres.

Wherefore your petitioner prays:

1. That this Court do issue its writ of mandate commanding respondent, in his official capacity as the Surveyor General and the Register of the State Land Office, to show cause to the Court, at a time to be fixed by the Court for that purpose, why he should not be compelled to approve the application of petitioner hereinabove referred to, and that if respondent shall fail to show cause, then that he be

Government's Exhibit No. 16-A—(Continued)
compelled by the mandate of this Court to approve
said application, in his official capacity as Surveyor
General and Register of the State Land Office of
the State of California;

2. Such further and other relief as may to the
Court seem proper;

3. Judgment for costs.

B. M. AIKINS,
Attorney for Petitioner.

State of California,
Trinity County—ss.

J. H. Jordan, being first duly sworn, deposes and
says:

That he is the petitioner in the above entitled
action; that he has read the foregoing Petition for
Writ of Mandate, and knows the contents thereof;
that the same is true of his own knowledge, except
as to matters which are therein stated on informa-
tion or belief, and as to those matters that he be-
lieves it to be true.

J. H. JORDAN.

Subscribed and sworn to before me, this 26th day
of October, 1912.

[Seal.] H. F. COFFMAN,
Justice of the Peace in and for Trinity Center
Township, Trinity Co., Calif.

Received in evidence April 26, 1948.

Mr. Critchlow: Then a copy of the answer commencing on page 15.

The Court: That is the answer of Kingsbury?

Mr. Critchlow: The answer of the defendant Kingsbury.

The Court: That will be 16-B.

Mr. Critchlow: The answer to include Exhibit A attached to the answer and made a part of it, which appears beginning at page 19.

The Court: That will be all of the answer with the exhibits?

Mr. Critchlow: That is correct.

The Clerk: Government's 16-B.

(The document referred to was received in evidence and marked Government's Exhibit No. 16-B.)

GOVERNMENT'S EXHIBIT No. 16-B

[Title of Court and Cause.]

ANSWER

Comes now the above-named respondent, and without waiving his demurrer this day served and filed, but expressly insisting upon the same, answers petitioner's petition or complaint herein, and admits, denies and avers as follows:

I.

Respondent admits that petitioner's application, referred to in the complaint, was filed in the office of the Surveyor General of the State of California. Respondent avers that thereafter, on to wit, the 1st day of October, 1912, the said application came on

Government's Exhibit No. 16-B—(Continued)

regularly for hearing under and pursuant to the provisions of section 3498 of the Political Code; that after a full hearing and examination the application of said Judson H. Jordan for the lands in the complaint described was disapproved and disallowed by said Surveyor General; that a copy of the judgment and order of said Surveyor General so disallowing and disapproving said application is hereunto attached marked Exhibit A and made a part hereof.

II.

Admits that two surveys of Township 29 South, Range 20 East, M. D. M., were made under the authority of the United States government but in this connection respondent avers the fact to be that said township and range was duly and regularly surveyed by survey made prior to the 27th day of April, 1869, under the authority of the United States and approved on said last mentioned date and that by said survey the school sections in said township granted to the State by the Act of Congress of March 3rd, 1853, were created and established and the title thereto passed to and vested in the State of California; that by said survey the quantity of land in said township to which the State was entitled under said Act of Congress was fixed and determined and likewise, by said survey the said school sections were established and created and the location of the same and the boundary lines thereof were definitely fixed, created and established. That prior to the filing of the application of the plaintiff

Government's Exhibit No. 16-B—(Continued)
herein and prior to the survey of 1893 referred to in the complaint herein the State of California sold and disposed of all the lands to which it was entitled in said township and closed and settled its account with the government so far as said township 29 is concerned.

Denies that the lands contained within the Carpenter Survey as set forth in the petition herein and lying outside of the boundary lines of the Reed Survey referred to in the petition herein did by virtue of said Carpenter Survey immediately or at all pass to or vest in the State of California as school lands under the grant of Congress of the 16th and 36th sections in each township, or otherwise or at all but on the contrary said respondent avers that said lands are not the lands of the State of California.

III.

Denies that respondent has declined to approve the application of petitioner herein upon the sole ground that it does not appear to him that the land is subject to sale but on the other hand respondent avers that as hereinbefore set forth he has determined and adjudged that said lands do not belong to the State of California and has heretofore made an order disapproving said application of said plaintiff, a copy of which said order is hereunto annexed and marked Exhibit A and by reference thereto made a part of this paragraph of respondent's answer, likewise, respondent denies that the said

Government's Exhibit No. 16-B—(Continued)
conclusion or any conclusion is based upon a doubt upon his part as to whether said lands did in fact pass to and vest in the State of California by virtue of the Carpenter Survey referred to in the petition herein and in this connection respondent avers that the application of petitioner herein was disapproved by respondent in the regular course of administration of the office of respondent and under and pursuant to Section 3498 of the Political Code of the State of California, all of which will more fully appear from the said order hereunto attached and hereinbefore referred to.

IV.

Respondent has no information or belief upon the subject sufficient to enable him to answer and therefore denies that the portion of the lands described in the said application not already disposed of by the State are more particularly described as set forth in paragraph twelve of the petition herein.

Wherefore respondent prays that petitioner take nothing by this proceeding, that the same be dismissed and that he recover his costs herein.

U. S. WEBB,

Attorney General, and

MALCOLM C. GLENN,

Deputy Attorney General, Attorneys for said Respondent.

Government's Exhibit No. 16-B—(Continued)

EXHIBIT A

Office of the State Surveyor General and Ex Officio
Register of the State Land Office of the State
of California.

Sacramento, California, October 1, 1912

The application of Judson H. Jordan to purchase the South $\frac{1}{2}$, and the Northeast $\frac{1}{4}$ of Section 36, Township 29 South, Range 20 East, M. D. M., which said application was filed in the office of the Surveyor General on the 22nd day of March, 1912, having come on regularly for hearing on September 23, 1912, under and pursuant to section 3498 of the Political Code as amended by an Act of the Legislature of the State of California approved March 13th, 1911 (Statutes 1911 page 1409) and notice of the said hearing having been regularly given as in said section provided, and said applicant having appeared in person before a Deputy Surveyor General and having been then and there regularly examined under oath; and after full hearing and examination it is by said Surveyor General determined, found and adjudged:

That the lands applied for by said applicant did not at the time of the presentation and filing of said application and do not now nor does any part thereof belong to the State of California, and have never been subject to sale and are not now subject to sale; the said lands applied for and described in the application as the South $\frac{1}{2}$ and the Northeast $\frac{1}{4}$ of Section 36 Township 29 South, Range 20 East

Government's Exhibit No. 16-B—(Continued)

M. D. M. according to the official survey thereof made by the United States Deputy Surveyor Carpenter, approved November 18th, 1893, and containing 480 acres are not a part of school section No. 36 in said township and range aforesaid which was granted to the State of California by Act of March 3, 1853; that long prior to the filing of the plaintiff's application herein and prior to the said survey approved November 18, 1893, the State of California sold and disposed of all its school lands situated in said township 29 South, Range 20 E., M. D. and M; that under the act of March 3rd, 1853, the Congress of United States granted to the State of California Section 16 and 36 in each township; that said grant was a grant by townships and while such grant was one in praesenti yet as the same must necessarily have remained uncertain until actual survey for the purpose of determining the exact location of such sections title thereto did not pass to the state until the approval of the survey of the various townships; that as shown by the records of the State Land Office township 29 South of Range 20 E., M. D. M. was surveyed by authority of the government of the United States prior to the 27th day of April 1869 and on said last mentioned date the said survey was duly approved by the United States Surveyor General; that by said survey and the approval thereof the quantity of said land in said township to which the State was entitled under said Act of March 3rd, 1853 was determined and likewise the position of each of said

Government's Exhibit No. 16-B—(Continued)

school sections was located and the title to these two sections of land as created and established by said survey passed to and vested in the State of California; that likewise, the boundary lines of said sections were fixed and established; that acting upon and in accordance with the said survey as made and approved in the year 1869 aforesaid, the State of California, prior to the said survey of 1893 sold and disposed of all of said sections 16 and 36 in said township and issued its patents therefor. That the said survey of 1893 changes the boundary lines of said section 36 as established and created by said survey of 1869; that a large portion of land contained in said section 36 as established and created by said survey of 1869 is not included within the boundaries of the land designated as section 36 by the survey of 1893, and likewise, by said latter survey a considerable portion of land to the east and south of the east and south boundary lines of said section 36 as established by said survey of 1869 (and being the land described in the application of said Jordan) is included within the boundary lines of the land designated as section 36 by the survey of 1893. That said land while designated section 36 is not the section 36 which passed to the State of California under the said Act of March 3, 1853; that the said section 36 which passed to the said State under said act does not include any of the land described in said applicant's application; that said land belongs to the government of the United States; that great confusion has

Government's Exhibit No. 16-B—(Continued)
arisen by reason of said improper designation and
by reason of said re-survey of 1893 and that if the
application of said Jordan be approved the same
would amount to a recognition by the State as to
the boundary lines constituting school section 36 in
said township which would conflict with the bound-
ary line of the school section—said section 36 sold
by said State and many acres of land which the said
State has heretofore sold as being within section
36 would be excluded therefrom and the title of
the State's grantees clouded;

For the foregoing reasons the application of said
Judson H. Jordan for the land therein described
is hereby disapproved.

[Answer duly verified, served and filed.]

Received in evidence April 26, 1948.

Mr. Critchlow: Then the copy of the findings
and conclusions of law beginning at page 23.

The Court: That will be 16-C.

(The document referred to was received in
evidence and marked Government's Exhibit
No. 16-C.)

Mr. Critchlow: And a copy of the judgment be-
ginning at page 37.

The Court: 16-D.

(The document referred to was received in
evidence and marked Government's Exhibit
No. 16-D.)

GOVERNMENT'S EXHIBIT No. 16-D

[Title of Court and Cause.]

Judgment

This action having on the 15th day of November, 1912, regularly come on to be tried by the Court, B. M. Aikins, Esq., appearing as attorney for petitioner, and Malcolm C. Glenn, Esq., Deputy Attorney General, appearing as attorney for the respondent, and evidence having been introduced and the cause having been argued by counsel, and having been submitted to the Court for its decision; and the Court having filed its decision that the lands contained within Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., as surveyed by United States Deputy Surveyor Carpenter, and lying outside of the boundary lines of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., as surveyed by United States Deputy Surveyor Reed, did, by virtue of said Carpenter survey pass to and vest in the State of California as school lands, under the grant of Congress of the 16th and 36th sections in each township; and that the petitioner is entitled to a peremptory writ of mandamus, commanding respondent, in his official capacity as Surveyor General and Register of the State Land Office of the State of California, to approve the application of petitioner for that portion of the Northeast one-quarter ($\frac{1}{4}$) and South one-half

($\frac{1}{2}$) of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., according to the survey thereof approved November 18, 1893, which lies without the boundaries of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., according to the survey thereof approved April 27, 1869, which said land is also described as constituting the fractional Northeast one-quarter ($\frac{1}{4}$) and South one-half ($\frac{1}{2}$) of said Section Thirty-six (36), according to the township plat thereof approved November 18, 1893; and that petitioner is further entitled to a judgment against respondent for the costs of suit herein; and having ordered judgment to be entered accordingly;

Now, therefore, it is ordered, adjudged and decreed that the lands contained within said Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., as surveyed by United States Deputy Surveyor Carpenter, and lying outside of the boundary lines of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., as surveyed by United States Deputy Surveyor Reed, did, by virtue of said Carpenter survey, pass to and vest in the State of California as school lands, under the grant of Congress of the 16th and 36th sections in each township; and

It is further ordered, adjudged and decreed, that a peremptory writ of mandamus do issue herein, commanding respondent, in his official capacity as

Surveyor General and Register of the State Land Office of the State of California, to approve the application of petitioner for that portion of the Northeast one-quarter ($\frac{1}{4}$) and South one-half ($\frac{1}{2}$) of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., according to the survey thereof approved November 18, 1893, which lies without the boundaries of Section Thirty-six (36), Township Twenty-nine (29) South, Range Twenty (20) East, M. D. B. & M., according to the survey thereof approved April 27, 1869, which said land is also described as constituting the fractional Northeast one-quarter ($\frac{1}{4}$) and South one-half ($\frac{1}{2}$) of said Section Thirty-six (36), according to the township plat thereof approved November 18, 1893; and that petitioner have and recover from respondent herein his costs of suit, taxed at () Dollars.

February 26th, 1913.

J. M. SEAWELL,
Judge.

Received in evidence April 26, 1948.

Mr. Critchlow: I offer as plaintiff's Exhibit 17 a certified copy of a patent from the State of California to Judson H. Jordan and signed by Hiram W. Johnson, Governor of the State of California, and attested to by Frank C. Jordan, Secretary of State.

The Court: And the date?

Mr. Critchlow: Dated November 19, 1915, which

purports to convey that portion of the northeast quarter and the south half of Section 36, Township 29 South, Range 20 East, Mount Diablo Meridian, according to the survey thereof approved November 18, 1893, which lies without the boundaries of Section 36, Township 29 South, Range 20 East, Mount Diablo Meridian, according to the survey thereof approved April 27, 1869.

The Clerk: Government's Exhibit No. 17 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 17.)

GOVERNMENT'S EXHIBIT No. 17

United States of America

State of California

To All Whom These Presents Shall Come, Greeting:

Whereas, Under the provisions of an Act of the Congress of the United States, entitled "An Act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March third, eighteen hundred and fifty-three, there was granted to the State of California, ten sections of land for the erection of public buildings, seventy-two sections for a seminary of learning, and the sixteenth and thirty-sixth sections of each township in said State and lands selected in lieu thereof under the provisions of said Act and also under

the provisions of subsequent Acts of said Congress of the United States; and whereas, the Legislature of the State of California has provided for the sale and conveyance of said lands by statutes enacted from time to time; and whereas, it appears by the certificate of the Register of the State Land Office, No. 14366, issued in accordance with the provisions of law, bearing date the 18th day of November, 1915, that the tracts of land hereinafter described and being a part of the grant of the sixteenth and thirty-sixth sections and lands in lieu thereof, have been duly and properly located in accordance with law, that the laws in relation thereto have been complied with, that payment in full has been made, and that Judson H. Jordan is entitled to receive a patent therefor;

Now, Therefore, The State of California hereby grants to the said Judson H. Jordan and to his heirs and assigns forever, the said tracts of land located as aforesaid, and which are known and described as follows, to wit:

That portion of the northeast quarter and the south half of Section thirty-six (36), Township twenty-nine (29) south, Range twenty (20) east, Mount Diablo Meridian, according to the survey thereof approved November 18, 1893, which lies without the boundaries of Section thirty-six (36), Township twenty-nine (29) south, Range twenty (20) east, Mount Diablo Meridian, according to the survey thereof approved April 27, 1869; reserving in the people the absolute right to fish thereupon, as

provided by Section 25 of Article 1 of the Constitution of the State of California, containing three hundred one and thirty-eight hundredths (301.38) acres; together with all the privileges and appurtenances thereunto appertaining and belonging. To have and to hold the aforegranted premises to the said Judson H. Jordan and to his heirs and assigns, to his and their use and behoof, forever.

In Testimony Whereof, I, Hiram W. Johnson, Governor of the State of California, have caused these Letters to be made Patent, and the Seal of the State of California to be hereunto affixed. Given under my hand at the City of Sacramento, this, the 19th day of November, in the year of our Lord one thousand nine hundred and fifteen.

HIRAM W. JOHNSON,
Governor of State.

Attest:

FRANK C. JORDAN,
Secretary of State.

[Seal] By /s/ FRANK H. CORY,
Deputy.

Countersigned:

W. S. KINGSBURY,
Register of State Land Office.

Filed for Record at the Request of J. H. Jordan. this 3 day of Mar., A.D. 1916, at 59 min. past 9 o'clock a.m., and Recorded in Book 17 of Patents, on Page 112, Records of Kern County.

/s/ CHAS. A. LEE,
County Recorder.

State of California,
County of Kern—ss.

I, Chas. H. Shomate, County Recorder of said County, do hereby certify that the annexed is a whole, true and correct copy of an original as will appear by reference to Book 17 of Patents, Page 112, now in my office, and that said copy has been compared with original and is a correct transcript therefrom.

Witness my hand and official seal this 19 day of March, A.D. 1947.

CHAS. H. SHOMATE,

Recorder in and for the County of Kern, California.

By /s/ VADA SMITH,
Deputy.

Received in evidence April 26, 1948.

Mr. Critchlow: Your Honor please, it is stipulated between the parties to this cause that the defendants in this action deraigned their title by mean conveyances from the State of California through the patent issued to Judson H. Jordan and by said claim dated November 19, 1915, which was issued pursuant to that writ of mandamus in the Jordan v. Kingsbury case.

Mr. Clark: You mean their record title?

Mr. Critchlow: Their record title.

Mr. Clark: So stipulated.

The Court: Very well. The stipulation is approved.

Mr. Clark: If the Court please, I have some items which I would like to offer a stipulation on.

Mr. Critchlow: That concludes the plaintiff's case, your Honor.

The Court: Very well.

Mr. Clark: No. 1, with reference as related to the patent from the State of California to the Jordans, I should like counsel for the Government to stipulate that the certificate of purchase dated December 1, 1914, may be admitted in evidence. I hold a copy of it in my hand.

Mr. Critchlow: No objection.

The Court: Defendants' Exhibit A.

The Clerk: Defendants' Exhibit A in evidence.

(The document referred to was received in evidence and marked Defendants' Exhibit A.)

DEFENDANTS' EXHIBIT A

Location No. 5238 Certificate of Purchase Visalia
Land District No. 17874, State Land Office of
the State of California.

State School Land Grant of 16th and 36th
Sections

Price per Acre, Two and 50/100 Dollars

Sacramento, 1st Day of December, 1914.

It Appearing from the Report of the County Treasurer,

That on November 19th, 1914, Judson H. Jordan paid to the State of California, the sum of One Hundred sixty and 19/100 (\$160.19) Dollars, being

twenty per cent of the purchase money, and interest on the balance up to January 1st, 1915, in advance, for 301.38 Acres of

State School Land

in the County of Kern, described as follows: that portion of the NE $\frac{1}{4}$ and the S $\frac{1}{2}$ of Section 36 T. 29 S., R. 20 E., M. D. M., according to the survey thereof, approved November 18, 1893, which lies without the boundaries of Section 36, T. 29 S., R. 20 E., M. D. M., according to the survey thereof approved April 27, 1869.

Now, Therefore, be it Known, That the said Judson H. Jordan having made payment of said twenty per cent for the above described tract of land, is the purchaser of the same, and if having in all other respects complied with the requirements of the laws providing for the sale of said lands, and if one year has elapsed since the approval of his application, he shall be entitled to receive a patent for the same upon surrendering this certificate to the State of California.

Amount of Purchase Money unpaid, \$602.76. Interest computed from October 9, 1914, date of ap-

proval of application. Next payment of interest is due Jan. 1st, 1915.

In Witness Whereof, the Register of said Land Office has hereto set his hand and affixed his Seal of Office the day and date above mentioned.

[Seal]

W. S. KINGSBURY,

Register of State Land Office.

Note: Interest is due and payable in advance on the 1st day of January of each year, if the interest is not paid by the 1st day of May following, this certificate shall ipso facto become Null and Void. (See Sec. 3513, P. C.)

Received in evidence April 26, 1948.

Mr. Clark: Now will you stipulate, Mr. Critchlow, that all taxes levied or assessed upon the land involved in this litigation have been paid by the defendants? I don't know whether that will become relevant or not, but will you so stipulate, subject to your objection as to relevancy?

Mr. Critchlow: I don't require that you make any proof of it. I object on the ground that it is immaterial.

The Court: You are asking for the stipulation that all taxes levied or assessed have been paid by the defendants or their predecessors?

Mr. Clark: Yes. They have all been paid of record, for whatever that may be worth.

The Court: It does not help me much if it is material because that leaves it, if any taxes have been levied or assessed. Have there been taxes levied and assessed?

Mr. Clark: Yes, and they have been paid regularly. They have been paid throughout regularly.

The Court: Since when?

Mr. Clark: That I don't know. It must be since the date of the patent.

The Court: Then is it stipulated that the State has levied and assessed taxes, that is, the State or its appropriate agency, the Court, has levied or assessed taxes upon the land in question since the date of the State patent, November, 1915, which taxes have been paid by the defendants or their predecessors in interest?

Mr. Clark: That is right. I can't tell you the details.

Mr. Critchlow: We don't dispute that fact. We object to it as being immaterial, if your Honor please, not tending to prove or disprove any of the issues in the case.

The Court: Do you stipulate that that is a fact?

Mr. Critchlow: Yes.

The Court: The objection as to its immateriality is overruled at this time.

Mr. Clark: Will the Court indulge me just a moment to consult with counsel?

(Conference between counsel.)

Mr. Clark: I think that is all, your Honor, subject to one suggestion. If it should become neces-

sary, for purposes of explanation or otherwise, to examine into any surveys made prior to 1869, Mr. Critchlow and I have informally agreed that we will have those surveys available for inspection. We have them in our possession now, at least I have, but there is no use encumbering this record with that large volume of material unless it should become necessary to use it.

The Court: Let me see now, the statute from which the statute of 1853 was derived was originally passed in the first or second session of Congress, was it not?

Mr. Clark: Yes.

The Court: It directed surveys.

Mr. Clark: I think the first surveys outside of the eastern states and the New England states were made pursuant to an Act of Congress about 1855 or 1853.

The Court: Outside of the Ohio Territory.

Mr. Clark: Yes, outside of the so-called Western Reserve Territory, in that area.

Mr. Critchlow: There were surveys made as early as——

The Court: There were surveys ordered by the Continental Congress.

Mr. Clark: Yes, but what we call the public lands today.

Mr. Critchlow: Outside of the Northwest Territory.

Mr. Clark: No, not the Northwest Territory, the area around Ohio.

The Court: That was the Ohio Territory.

Mr. Clark: Yes, the Western Reserve.

The Court: Sometimes called the Ohio Territory and sometimes the Northwestern Territory.

Mr. Critchlow: You don't mean by referring to those surveys, any surveys other than surveys immediately surrounding this township, do you?

Mr. Clark: What I have in mind is this: Suppose that at the time we take this case up for final consideration, whenever that may be, the Court should become curious to know how the conflict there originally occurred.

Mr. Critchlow: How there happened to be a hiatus?

Mr. Clark: It may be necessary to explain to the Court. It may be necessary for us to refer to some of the much earlier surveys. I don't think it will be, but if we do have to refer to them we will have them available so the Court can inspect them.

The Court: I understand your position, but what I have in mind is this—and it may be of no consequence—historically the United States have always had public lands, historically after the Declaration of Independence and during the period of the Continental Congress they agreed upon surveys, and historically during that period of time certain of the then states ceded their lands under acts of their own state legislatures to the federation of states, or to the so-called United States, or to the original 13 states, whatever they might call it.

Then follows the Louisiana Purchase in 1815, and the Florida Purchase later, and then there were subsequent acts of Congress directing the surveys there.

Now whether or not any of that is material lies in the fact that the statutes which Congress passed then and passed in the First or Second Session of the Congress and after the adoption of the Constitution are still on the books, with some modifications, and what was done under those, it would seem to me to be material as to what this law means as you are trying to apply it here.

Mr. Clark: That is right. I understand what your Honor has said to me, but I misapprehended the precise application of it at the moment. All of that is covered in these little pamphlets I have here, that is, the sources are given in these pamphlets, *Public Land System of the United States*, edited originally by Commissioner Proudfit. All the references are there and, as a matter of interest, the first one he gives is a reference to an act of the Colonial Congress in 1776 in passing some resolutions.

Then in 1836 there were statutory directions to the General Land Office to make surveys. Now these are the statutes, I take it, that your Honor has in mind.

The Court: No, there are other statutes, statutes which are mentioned here, 1796, 1877, and others, all related to the then public lands.

Now, as I say, it may have absolutely nothing

to do with how this case should be decided, or any issue of law in connection with it, and I do not pretend certainly to be any authority on the history of public lands, but I do have some knowledge about the topic, that it always has been a matter of public consideration of the acts of Congress and it has always been a matter of correcting errors in surveys, and certainly the United States must have established a pattern of interpretation of those statutes and a pattern of dealing with errors in public surveys, so that by long before this there should be no question as to the meaning of the statutes, unless we are to take the Supreme Court's decision in the Tidelands case and disregard everything that the United States has done for the last 150 years.

Mr. Clark: There is such pattern, if the Court please, if I may say so, and I think of one case at the moment, which is as early as 18 Howard, which interprets the general policy laid down by those statutes.

The Court: That is the pattern of the treating of errors in surveys. In other words, whether there were enlargements and increases, and that has been true ever since we have had public lands.

Mr. Critchlow: Or errors in the surveys made.

The Court: It first began because the surveyor generally had a contract and he was afraid to go out and survey the land because it was in Indian territory and the Indians might shoot him, so he surveyed it in his cabin.

Mr. Clark: Mr. Critchlow cited a case of mine which involved the precise facts which your Honor first mentioned. The surveyor didn't want to go into the mountains because there were Indians there so he just took a 40-mile shot with his transit.

Mr. Critchlow: The pattern usually followed by courts is this: When a survey has been made, even though erroneous, and rights are initiated under that survey those rights are sacred. In other words, they can't be disturbed.

The Court: If that is the case, where are you?

Mr. Critchlow: I think that that is the case.

The Court: The question here is what is the survey, is that it?

Mr. Critchlow: Yes. The survey is in Section 36 and the rights are vested in 36.

Now there was a hiatus between this boundary of 36 as established by the Reed survey and the westerly boundaries of some sections which were established in the adjoining township, and a hiatus between the sections which were surveyed down in the township below and the south boundary of this township (indicating on map), leaving a strip of land unsurveyed between those townships.

The Court: Let me ask you this, Mr. Critchlow: Certainly in all of the public lands the 16s and 36s which have been deeded to the State for schools, there certainly must have been some error in the surveys other than this section and it must have been made many years before the error occurred here or before the correction of error. Now

did the United States Government establish a pattern of dealing with those lands which involved this, on the one hand, that it should be 640 acres, no more or no less, or was the pattern of the United States Government interpreting the laws which you ask me to interpret here this pattern, that it was Section 16 or Section 36 regardless of the overage but in any event at least 640 acres?

Mr. Critchlow: I will say, if your Honor please, it was at least 640 acres.

Mr. Clark: That is our point.

The Court: But they did get some overage?

Mr. Clark: That is right.

Mr. Critchlow: In this very case, if your Honor please, they got overage in the Reed Section 36, and we don't dispute that they got it. There was probably maybe 40 acres or more than 640 acres in this Reed Section 36. That appears from Wilkes' survey.

Mr. Clark: That reminds me, I had forgotten one thing to ask a stipulation on.

Mr. Critchlow: For instance, Reed comes down here and he makes a survey, and instead of running, we will say, 80 chains from his corner to this corner (indicating) he runs around and he makes 81 chains. It is a mistake. Nevertheless he marks his boundary 81 chains. He comes down here and he may be one chain off here, he may be off two chains, and he marks his boundary there and marks it there and marks it there (indicating on map). It is the monuments on the ground that control.

So then here is Section 36. It was supposed to contain 640 acres and the statute says as near as may be. But if he has marked on the ground that additional area by his monuments, that is Section 36 and that passes. And if you look in the Wilkes' survey you will find that Tract 69 as surveyed out by Wilkes on the basis of the Reed survey contains more than 640 acres, but it is a section and it was at the time Section 36.

Now Carpenter's Section 36 is a different area. Our contention is that you can't get two Section 36s. This contains 300 acres of unsurveyed land, covers unsurveyed land. Supposing there had been an error——

The Court: What section was it under Carpenter's survey?

Mr. Critchlow: Before it was surveyed?

The Court: No, after it was surveyed.

Mr. Critchlow: It was called Section 36. Now our point is that just because it happens to be called Section 36, the State doesn't get it if its rights under the Act of 1853 have already been fulfilled. They may have called this anything, they might have thrown it into this lower tier of sections if they had wanted to. I don't know why they didn't.

The Court: But they did not.

Mr. Critchlow: They did not.

The Court: They made it Section 36.

Mr. Critchlow: That is right. Now if the Commissioner of the General Land Office, or the fellow

who has the supervision of the surveys, has the power by calling an area Section 36 when the State has already received all of its grants that it is entitled to in the township, why then of course they get it.

The Court: They have never called it.

Mr. Critchlow: But our contention is that he didn't have the power under the statute.

The Court: They have not called it anything but Section 36. It is still Section 36, is it not?

Mr. Critchlow: It is called Section 36.

The Court: And Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11.

Mr. Critchlow: And this is called Tract 69, that is right. That is the point in the case, if your Honor please. That is the real point in the case, as to whether or not they can get two Section 36s under the statute.

Mr. Clark: I wouldn't agree with that.

The Court: But this is not the full Section 36.

Mr. Critchlow: No.

The Court: If by designating this Section 36 that becomes the school land and by designating the other as Tract 69, then they had the right to take it away from the State.

Mr. Critchlow: But they didn't have a right to take it because it had vested as Section 36. They couldn't take it from you.

The Court: I see. Very well.

Mr. Clark had something he wanted to bring up, I believe.

Mr. Clark: Mr. Critchlow's statement seems to me, if the Court please, to proceed upon the assumption that there is a limitation expressed in the Federal Statute of 1853 to the effect that the State can't get more than 640 acres in Section 16 or Section 36 and there isn't anything of that kind in the act at all. The act gives all of Section 36. All that remains was to identify the land that passed pursuant to the grant.

But what I wanted to ask Mr. Critchlow to do, is to make another stipulation, which I am sorry to say I had forgotten, and that is on an important point. It is to this effect, if A. W. Sanborn, Deputy Surveyor General of the State of California, could be and were called to the stand in this case to testify, he would testify as follows:

"It sometimes happens that the State sections created by the United States survey, that is to say, Sections 16 and 36, exceed the number of acres, that is to say, exceed 640 acres in a section. In some cases the excess amounts to two or three hundred acres."

Mr. Critchlow: No, I will not stipulate to that.

Mr. Clark: Not even subject to objection?

Mr. Critchlow: No, because I would want to have a chance to cross-examine him.

Mr. Clark: He is dead.

Mr. Critchlow: I don't agree with the statement.

Mr. Clark: That is the way he testified.

Mr. Critchlow: He wasn't cross-examined. We

don't know who he is. Who was he, a State official?

Mr. Clark: Deputy Surveyor General of the State of California.

Mr. Critchlow: Of the State of California?

Mr. Clark: Yes.

Mr. Critchlow: Was he a California official or a United States official?

The Court: He was a California official.

Mr. Critchlow: Well, if your Honor please——

The Court: He was Kingsbury's deputy.

Mr. Critchlow: That would be incompetent, in any event, as his testimony could not vary the terms of the statute.

The Court: I think that that is material whether or not other Sections 16 and 36 have exceeded 640 acres and what has become of them. I think I can take judicial notice on examination of the plat maps in the Land Office that there are Sections 16 and 36 that exceed 640 acres. Where they are, I do not know.

Now what was the pattern established with relation to those? I know that in a number of them the State took the lieu lands.

Mr. Critchlow: If they are short they take the lieu lands.

The Court: They took lieu lands if they were narrower.

Mr. Critchlow: Yes.

The Court: And if they took lieu lands and if it was 680 acres, did they get 680 acres of lieu land or 640?

Mr. Critchlow: I think they got 640. They were all selected in that way.

The Court: The statute says they shall get the same fractional acreage in lieu land, as I remember reading it.

Mr. Clark: That is right.

Mr. Critchlow: Up to 640 acres, it specifies. It specifies the amount. I believe that is Section 851, your Honor.

Now I don't want to be misunderstood here. I think Mr. Clark misunderstands me. I didn't say that you never got more than 640 acres, because I will show you in this very case, this old Section 36 as surveyed by Reed—and there is no question but what the State got it—contains more than 640 acres. But it was a regular section and under the statute it says 640 acres more or less, or as near as may be, I believe is the language, as near as may be.

He marked it on the ground and they got it.

Now here you have another area which is surveyed and it is called Section 36.

The Court: When it was surveyed, Mr. Critchlow, the official of the United States who had that power to do so said that Reed's survey was worthless and fraudulent and so worthless that no title could be passed under it.

Mr. Critchlow: He might say that, if your Honor please, but if he did say it it was of no force and effect because there is no question about the fact that the area did pass under it. That is the reason

they had to go to work and have this other survey made, in order to show just what passed.

Now the pattern of public surveys as shown by the statutes is that Section 36 shall be in the southeast corner, that the township should be six miles square, and that each section shall be 640 acres as near as may be.

Now you have these surveys made at different times and sometimes the township happens to be short, either because of water, such as a lake, or because of other surveys. They say in such cases the excess or deficiency—the statute says this, shall be thrown into the northern or the western tier of sections, which means that as far as Section 36 is concerned, which the statute says goes to the State, it shall be a section containing 640 acres as near as may be and not two sections.

The Court: But it is not two sections.

Mr. Critchlow: Yes, it is. There is no question but what that is Section 36 under the Reed survey and that it passed.

Mr. Clark: I wonder if I might ask Mr. Critchlow a question along that line, with the Court's permission. Suppose the original Reed survey had placed 943 acres in Section 36 and that that had been proved, would the State have gotten it under the Act of 1853?

Mr. Critchlow: I can't imagine making an error of that sort, or an error of that sort happening down in that southeast corner.

Mr. Clark: You are not meeting me on my assumption, that is all.

Mr. Critchlow: I can't imagine such a thing.

The Court: Coming back to the matter of evidence here, you decline to accept Mr. Clark's stipulation?

Mr. Clark: Is there any form in which you would take that stipulation? The man testified to it in the State case, as you know. It was brought out of him on cross-examination.

Mr. Critchlow: I think as far as that is concerned, that the Court can take judicial notice of these plats and the surveys and if you can find any illustrations of that sort, and if the Court wants to admit them, that is all right, but I can't admit that testimony because I don't think it is true, not as far as Section 36 is concerned.

Mr. Clark: Will you stipulate that he so testified in that case?

Mr. Critchlow: What else have you got in there?

Mr. Clark: I just read that portion. You can read the whole thing. His testimony wasn't long. That was just taken from one paragraph of his cross-examination, if you will stipulate that he so testified in that case

The Court: Maybe he will want to stipulate to the rest of it too.

Mr. Clark: If you want to stipulate to the whole thing, that is all right with me.

Mr. Critchlow: I don't want to stipulate to the whole thing unless I have read it.

The Court: Do you have facilities available to use to ascertain these 16s and 36s in the state of

California? I should imagine they are in every state in the western area and probably in a lot of eastern states also.

Mr. Critchlow: I don't think so. That is disregarding the direct commands of the statute.

Mr. Clark: Even if they are, if there is jurisdiction to make the error the same as your Mexican land grant cases, if the survey included 500 acres that he shouldn't have included and the patent issued for that, why that is the end of it. That is our position in this case.

Mr. Critchlow: That doesn't have anything to do with this case.

Mr. Clark: It certainly does.

Mr. Critchlow: No, it does not.

The Court: It seems to me, Mr. Critchlow, that if the United States has established a pattern of dealing with errors in surveys or resurveys—this is not the first resurvey that has been made, is it?

Mr. Critchlow: No.

The Court: If the United States has established that pattern in dealing with their own surveys in public lands of granting whatever was in it, even with a surveyor's error, then that would seem to me to create a situation which I could not overlook.

Mr. Critchlow: But this wasn't in that. This area wasn't in that Reed section.

I call your Honor's attention to the case of *New Mexico v. Colorado*. And, by the way, the survey

in that case, the resurvey in that case was made by the same fellow who made this one, Carpenter, and Carpenter in that case was directed to erect monuments of the earlier surveys, which he did, and the Land Department accepted it so far as it could, and yet the Court said, no, you go back to that old survey.

The Court: I have not read that case. I glanced quickly at the Wyoming case, which did not seem to me to be in point. There might be a lot of dicta in there which may be in point, but in *United States v. Wyoming* there the State was endeavoring to establish a right to certain lands prior to the time they were surveyed, and the Supreme Court held in that case, as I glanced at it quickly, that the State did not get any right until it was surveyed.

Mr. Critchlow: That is correct. And that was cited only to the point that the State does get the right when the survey is final.

The Court: When did the survey become final here?

Mr. Critchlow: When it was approved. This Reed survey became final, as far as the State is concerned, on April 27, 1869.

The Court: But it was in error.

Mr. Critchlow: That doesn't make any difference.

The Court: It was fraudulent.

Mr. Critchlow: That doesn't make any difference.

The Court: It was worthless, the Land Office said.

Mr. Critchlow: The Land Office can say it was worthless, but it wasn't because the State got it, has had it ever since, and the Land Office couldn't take it away from them.

Mr. Clark: They could by requisition.

Mr. Critchlow: If you want to bring direct proceedings on the ground of fraud and claim the State was a party to it, all right.

The Court: There isn't any question to this case that at the time the State got his this was mineral land, or known oil land?

Mr. Critchlow: No, that is not in the case.

Mr. Clark: No, it is not involved at all.

Mr. Critchlow: It may have been known but I don't know whether it was known or not.

The Court: When are you going to let me know whether or not you accept the stipulation that Mr. Sanborn did or did not so testify?

Mr. Critchlow: I will agree that he so testified, subject to the objection that it is hearsay, incompetent, irrelevant, immaterial, doesn't tend to prove or disprove any issue in the case, calling for a conclusion of the witness, and it is an attempt to establish a pattern or custom, without showing any basis of his knowledge. I object to it on all grounds.

The Court: And all the rest of the grounds?

Mr. Critchlow: All the rest of them, if there are any.

Subject to those objections, I will accept the stipulation.

The Court: You might have a good objection there.

Will you stipulate that he was the Deputy Surveyor General of the State of California and had been—for how long was he?

Mr. Clark: It doesn't state in this transcript, I am afraid, as to how long he had been but he had been there for many years.

Mr. Critchlow: If they will state that that is a fact I will stipulate to it. In other words, I won't put them to proof of that fact.

Mr. Clark: No, your Honor, it doesn't state how long he had been deputy.

The Clerk: Where is Exhibit 15, Mr. Critchlow?

Mr. Critchlow: We withdrew it.

The Clerk: I want to make a record of it.

The Court: What is the final position on the stipulation? Were you awaiting a ruling from me? You say you could not tell how long he had been Deputy Surveyor General?

Mr. Clark: No, I don't know. I can find out from the records up in the Surveyor General's office.

Mr. Critchlow: If you will say that he was a Deputy Surveyor General of the State of California, I will accept it.

Mr. Clark: I have read it in the record.

Mr. Critchlow: All right. I will stipulate to it.

The Court: Do you expect to develop in your

brief any information concerning the number of Sections 16 and 36?

Mr. Clark: It is pretty difficult to find, if your Honor please. We have searched the General Land Office reports on that and there are instances of it but they are generally overlooked. It apparently is just common practice to disregard things of that kind. Nobody pays any attention to it.

The Court: They are on the surveys?

Mr. Clark: They are on the surveys.

The Court: You have to look at the plat of each township.

Mr. Clark: They are on the surveys but we would have to have so many surveys examined pretty carefully, and thus far we have limited our examination of surveys to plats and surveys surrounding this particular area here, Township 29. We can extend that search and send a man to Washington to look into it and see.

The Court: You have them all in the Sacramento Land Office, do you not?

Mr. Critchlow: You have them in San Francisco or Sacramento or in Los Angeles.

The Court: You have all the old Visalia and Sacramento records in Sacramento now, the old books.

Mr. Clark: I can do that.

Mr. Critchlow: And the southern records are down in Los Angeles

The Court: It would involve a skilled person going through there and looking at each one.

Mr. Clark: I can send one of our young men up there and get certified copies of those that are pertinent.

The Court: In any event you do that and you can develop that in your brief. I think I can take judicial notice of public records.

Mr. Critchlow: Yes, I think so.

Mr. Clark: Yes.

The Court: What do you want to do next? Mr. Clark, when will you finally get down to this case?

Mr. Clark: I thought we were finally down to it now. I have nothing that would interfere with the case during the remainder of this month except the possible matter on May 3rd, a notice for summary judgment in Federal Court in San Francisco. Otherwise I am at the disposal of Court and counsel on this case throughout the entire month.

The Court: You have no more evidence to offer?

Mr. Clark: No.

The Court: How soon can you develop that information?

Mr. Clark: I imagine we ought to be able to do it, if we can do it at all, within a week.

Mr. Critchlow: Let me ask you, because I want to make some check myself, as I say, I think that probably there are lots of sections like this particular one which is slightly over 640 acres, maybe 20 or 30 acres, through an error in chains or something of that sort, but I don't think you are ever going to find any that would come close to 300 acres.

Mr. Clark: We can try. But you are not going to complain if we find one that is 250?

Mr. Critchlow: I was going to say if you find one for 250 that is not going to control the construction of the statute. I will tell you that.

The Court: What is your pleasure in the matter? Do you want time for briefs or is all your law in, this law that you have given me already?

Mr. Critchlow: I think that there is no dispute between us except as to the interpretation of the Federal statutes.

Mr. Critchlow: How do you want to handle it, on briefs or argue it orally and have the argument taken down and handed to the Court?

Mr. Critchlow: Either way. It is all right with me

The Court: I think in this matter it would be more helpful if you would file briefs and then I may set it down for argument because I get more out of argument if I know what kind of questions to ask during the course of the argument. Now I am pretty much completely at sea and I do not have available here in Fresno—I have available in my Los Angeles office—a complete set of statutes. The set here only begins with Volume 17 I think. I do not think that they would be material except to follow the derivation of those statutes. There is no question about the derivation as it finds expression in Section 851?

Mr. Clark: No.

The Court: Very well. How long do you want to file briefs, 10 days?

Mr. Critchlow: I think 10 days is sufficient. I would like to have a little time to check. I can check those records down south if you can check them up north, Mr. Clark.

The Court: Suppose you each file briefs in 10 days and each have 5 days to reply to the other's brief. Will that be satisfactory?

Mr. Critchlow: That is all right.

Mr. Clark: Yes.

The Court: And if I want argument either one of you will be available to come here or to Los Angeles?

Mr. Critchlow: That is right.

Mr. Clark: Subject to one thing, and this is off the record

(Remarks outside the record.)

The Court: Did you want this Morris Cohen permit?

Mr. Critchlow: Yes.

The Court: Can you give me the date that that permit was finally canceled?

Mr. Critchlow: I will find it, if your Honor please, down in Los Angeles.

The Court: You are not offering that in evidence?

Mr. Critchlow: No.

The Court: You are not making any point of the fact that the Government did issue two oil and gas prospecting permits on that?

Mr. Critchlow: I had them merely because of the allegation in the complaint that the Government

had never made any claims to this area and I wanted, if any evidence should be offered on that point, to show the issuance of these oil and gas leases which cover this area covered by the patent to Jordan.

The Court: Oil and gas prospecting permits?

Mr. Critchlow: Permits; yes.

The Court: They were both canceled because there was no development work done?

Mr. Critchlow: That is my recollection, if your Honor please.

The Court: I suppose if they introduced evidence on that, why then the other side would be entitled to go out and interview old settlers to see how many notices they had posted to keep off of this land because it belongs to so-and-so.

Mr. Critchlow: I am not offering it if your Honor please, and they haven't offered any evidence on that.

The Court: Each side will have 10 days for opening and 5 days for reply.

Mr. Clark: Thank you, your Honor.

Mr. Critchlow: Will your Honor take the files and exhibits down to Los Angeles?

The Court: I will keep them here as long as I am here.

Mr. Critchlow: The reason I ask is because those are the only copies which I have of a number of the exhibits, and in writing the brief I might want to make reference to them.

The Court: I expect to be here all this week.

Mr. Critchlow: Yes, your Honor.

The Court: Very well. Court is adjourned.

(Whereupon, at 4:25 o'clock p.m., court was adjourned.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 30th day of April, A.D., 1948.

.....

Official Reporter.

[Endorsed]: Filed U.S.D.C. November 1, 1948.

[Endorsed]: Filed U.S.C.A. January 5, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages

numbered from 1 to 122, inclusive, contain the original Complaint to Remove Clouds, to Quiet Title and to Enjoin Trespasses on Certain Real Property in Kern County, California; Answer; Disclaimer; Amendment to Complaint; Amended Answer to Amended Complaint; Two Stipulations and Orders for Substitution of Parties; Memorandum Prior to Trial; Plaintiff's Memorandum Pursuant to Local Rule 12; Appendix to Plaintiff's Brief; Appendix to Opening Brief for Defendants; Memorandum; Judgment for Defendants; Notice of Appeal; Statement of Points Under Rule 75(d) Federal Rules of Civil Procedure; Designation of Contents of Record on Appeal; Affidavit of Service by Mail; Order Extending Time for Filing and Docketing Record on Appeal; Designation of Additional Portions of Record, Proceedings and Evidence on Appeal Under Rule 75(a) Federal Rules of Civil Procedure; Affidavit of Service by Mail; and Order Extending Time for Filing and Docketing Record on Appeal which, together with copy of Reporter's Transcript of Proceedings on April 26, 1948, original Plaintiff's Exhibits 1, 1-A, 2, 3, 4, 4-A, 5, 6, 6-A, 6-B, 6-C, 7, 8, 9 10, 11, 12, 12-A, 12-B, 12-C, 12-D, 12-E, 13, 14, 15 for identification, 16, 16-A, 16-B, 16-C, 16-D, 17 and original Defendants' Exhibit A, and certified copies of certain records in the United States Department of the Interior, Bureau of Land Management and of the Division of State Lands, State Lands Commission, State of California of which the court took judicial notice,

transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 3rd day of Jan., A.D., 1949.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12448. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Florence K. Livingston, Executrix of the Will of Bronte M. Aikins, deceased (sued herein as B. M. Aikins), Florence K. Livingston, executrix of the last will of Florence L. Kirchen, deceased, George B. Parker, Nelle Grenville Parker, Vernon S. Batz (also known as V. S. Batz), Edna Batz, D. M. Jordan, George Hay Corporation, Ltd., a corporation, Honolulu Oil Corporation, a corporation, Seaboard Oil Company of Delaware, a corporation and the County of Kern, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed January 5, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

Appeal No. 12448

(Civil Action No. 617-ND District Court, Southern District of California, Central Division.)

UNITED STATES OF AMERICA,

Appellant,

vs.

A. L. AIKINS (and BRONTE M. AIKINS, as executor of the last will of A. L. Aikins, deceased, by substitution), B. M. AIKINS, FLORENCE L. KIRCHEN (and FLORENCE K. LIVINGSTON, as executrix of the last will of Florence L. Kirchen, deceased, by substitution), GEORGE B. PARKER, NELLE GRENVILLE PARKER, VERNON S. BATZ (also known as V. S. Batz), EDNA BATZ, D. M. JORDAN, GEORGE HAY CORPORATION, LTD., a corporation, HONOLULU OIL CORPORATION, a corporation, SEABOARD OIL COMPANY OF DELAWARE, a corporation, THE COUNTY OF KERN, JOHN DOE, RICHARD ROE, MARY COE, BLACK CORPORATION, and WHITE CORPORATION,

Defendants.

STATEMENT BY UNITED STATES OF
AMERICA, APPELLANT, OF POINTS TO
BE RELIED UPON ON ITS APPEAL AND
DESIGNATION OF PARTS OF THE REC-
ORD NECESSARY FOR CONSIDERATION
OF SAID APPEAL.

United States of America, appellant, hereby adopts the statement of points upon which it intends to rely on this appeal, heretofore filed in the above entitled action in the United States District Court for the Southern District of California, Central Division, appearing at pages 105 to 106, inclusive, of the certified record herein, and states that the points therein set forth are the points on which said appellant intends to rely on its said appeal.

And United States of America, appellant, hereby designates the following parts of the record which it believes to be necessary for the consideration of its said appeal, and requests that such parts be printed:

1. Complaint filed May 2, 1947, appearing at pages 2 to 12, inclusive, of the certified record herein. (N.B.—Exhibits A, B, and C attached to said complaint are respectively uncertified copies of certain certified plats introduced in evidence and hereinafter designated for printing as plaintiff's exhibits 3, 11 and 14. A duplication of these plats would seem to be unnecessary.)

2. Answer of defendants filed June 30, 1947,

appearing at pages 13 to 18, inclusive, of the record herein.

3. Disclaimer of County of Kern appearing at page 21 of the record herein.

4. Amendment to complaint filed August 11, 1947, appearing at pages 23 to 24, inclusive, of the record herein.

5. Amended answer to amended complaint filed August 11, 1947, appearing at pages 25 to 30, inclusive, of the record herein.

6. Memorandum opinion of the District Court filed May 20, 1949, appearing at pages 84 to 98, inclusive, of the record herein.

7. Judgment for defendants entered August 22, 1949, appearing at pages 99 to 101, inclusive, of the record herein.

8. Notice of appeal filed October 20, 1949, appearing at pages 102 and 103 of the record herein.

9. Statement of points under Rule 75 (d) FRCP, filed November 10, 1949, appearing at pages 105 and 106 of the record herein.

10. Designation by plaintiff and appellant of contents of record on appeal filed November 10, 1949, appearing at pages 107 and 108, of the record herein.

11. Designation by defendants and appellees of additional portions of the record on appeal filed November 22, 1949, appearing at pages 112 and 113 of the record herein.

12. Clerk's docket entries, appearing at pages 119 to 122, inclusive, of the record herein.

13. Reporter's transcript of proceedings filed November 1, 1948, (74 pages).

14. The following exhibits:

Plaintiff's exhibits 3, 6, 6-a, 6-b, 6-c, 8, 9, 11, 12-a, 12-b, 12-c, 12-d, and 12-e (N.B.—The foregoing exhibits, viz., 12-a, b, c, d, and e, are separate documents contained in a file of documents marked for identification as Plaintiff's Exhibit 12), 14, 16-a, 16-b, and 16-d (N.B.—The foregoing exhibits, viz., 16-a, 16-b, and 16-d are a Complaint, an Answer, and a Judgment as said documents are set out in a document marked for identification as Plaintiff's Exhibit 16, at pages 3 to 13, 15 to 23, and 37 to 39 thereof), and 17.

Defendants' exhibit "A."

15. This statement of points and designation of the parts to be printed.

16. Certificate of Clerk.

Dated at Los Angeles, California, this 5th day of January, 1950.

/s/ ERNEST A. TOLIN,

United States Attorney.

/s/ FRANCIS B. CRITCHLOW,

Special Assistant to the Attorney General, Attorneys for Appellant United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed January 5, 1950.

[Title of Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS MAY BE
CONSIDERED IN THEIR ORIGINAL
FORM WITHOUT REPRODUCTION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that upon the appeal of the above-entitled cause the Court may consider, as being and constituting a portion of the record on appeal and without the necessity of having the same printed or otherwise reproduced pursuant to Rule 19 of the Rules of this Court, the following documents of which judicial notice was taken by the district court upon the trial of this cause:

(1) All of the exhibits contained in the appendix to plaintiff's brief filed June 4, 1948, said exhibits being more particularly described in item 12 of appellant's designation of contents of record on appeal filed November 10, 1949, and appearing at pages 107 and 108 of the record herein.

(2) The officially certified copies of official plats of survey of various townships within the State of California, made and approved by or under the authority of and bearing the respective approval dates of United States Surveyors' General, The General Land Office, or the Department of the Interior, which were designated as an additional portion of the record by defendants and appellees Designation of Additional Portions Of The Record On Appeal

filed November 22, 1949, appearing at pages 112 and 113 of the record herein.

Dated: January 18, 1950.

ERNEST A. TOLIN,
United States Attorney.

FRANCIS B. CRITCHLOW,
Special Assistant to the
Attorney General.

By /s/ FRANCIS B. CRITCHLOW.
Attorneys for Plaintiff,
United States of America.

WILLIAM A. BREEN,
Attorney for Defendant.

FLORENCE K. LIVINGSTON
as Executrix of the Last Will
of B. M. Aikins, Deceased.

PHILIP M. WAGY,
Attorney for Defendants George Hay Corporation,
Ltd., George B. Parker, Nelle Grenville Parker,
Vernon S. Batz, Edna Batz, D. M. Jordan.

PATRICIA LANE,
Attorney for Florence L. Livingston, as Executrix
of the Last Will of Florence L. Kirchen, De-
ceased.

A. W. MITCHEM,
GILBERT E. HARRIS,
HERBERT W. CLARK,
Attorneys for Defendants Honolulu Oil Corpora-
tion and Seaboard Oil Company of Delaware.

By /s/ HERBERT W. CLARK,
Attorneys for Defendants.

It Is So Ordered This 20th day of January, 1950.

/s/ WILLIAM DENMAN,
Judge of the United States
Court of Appeals.

/s/ WILLIAM HEALY,

/s/ HOMER BONE,
Judges U. S. Court of Appeals
for the Ninth Circuit.

[Endorsed]: Filed January 23, 1950.

In the United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

FLORENCE K. LIVINGSTON, EXECUTRIX OF THE WILL OF
BRONTE M. AIKINS, DECEASED (SUED HEREIN AS B. M.
AIKINS), FLORENCE K. LIVINGSTON, EXECUTRIX OF THE
LAST WILL OF FLORENCE L. KIRCHEN, DECEASED, GEORGE
B. PARKER, NELLE GRENVILLE PARKER, VERNON S.
BATZ (ALSO KNOWN AS V. S. BATZ), EDNA BATZ, D. M.
JORDAN, GEORGE HAY CORPORATION, LTD., A CORPORA-
TION, HONOLULU OIL CORPORATION, A CORPORATION,
SEABOARD OIL COMPANY OF DELAWARE, A CORPORATION,
AND THE COUNTY OF KERN, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

A. DEVITT VANECH,
Assistant Attorney General.

ERNEST A. TOLIN,
*United States Attorney,
Los Angeles, California.*

FRANCIS B. CRITCHLOW,
*Special Assistant to the Attorney General,
Los Angeles, California.*

ROGER P. MARQUIS,
S. BILLINGSLEY HILL,
*Attorneys, Department of Justice,
Washington, D. C.*

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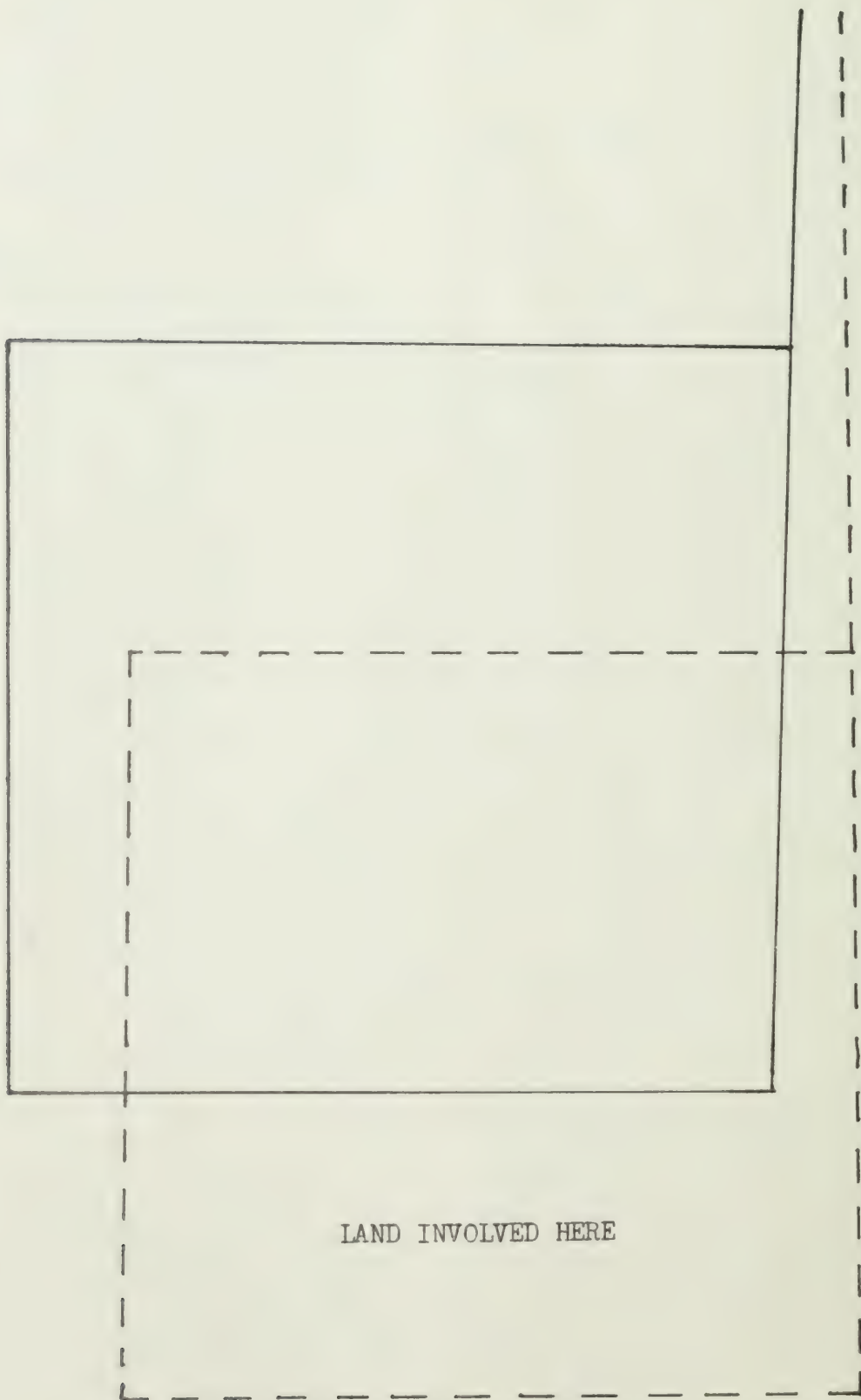
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APPROXIMATE RELATIVE LOCATIONS OF THE TWO
SURVEYS OF SECTION 36



——— LINES OF REED SURVEY
- - - - LINES OF CARPENTER SURVEY

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12448

UNITED STATES OF AMERICA, APPELLANT

v.

FLORENCE K. LIVINGSTON, EXECUTRIX OF THE WILL OF
BRONTE M. AIKINS, DECEASED (SUED HEREIN AS B. M.
AIKINS), FLORENCE K. LIVINGSTON, EXECUTRIX OF THE
LAST WILL OF FLORENCE L. KIRCHEN, DECEASED, GEORGE
B. PARKER, NELLE GRENVILLE PARKER, VERNON S.
BATZ (ALSO KNOWN AS V. S. BATZ), EDNA BATZ, D. M.
JORDAN, GEORGE HAY CORPORATION, LTD., A CORPORA-
TION, HONOLULU OIL CORPORATION, A CORPORATION,
SEABOARD OIL COMPANY OF DELAWARE, A CORPORATION,
AND THE COUNTY OF KERN, APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 28-42) is re-
ported in 84 F. Supp. 260.

JURISDICTION

This is an appeal from a judgment entered August 22,
1949, quieting title to certain land in the appellees
against the United States (R. 43). Notice of appeal was

filed October 20, 1949 (R. 46). The jurisdiction of the district court was invoked under 28 U.S.C. sec. 1345. The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

STATUTE INVOLVED

Pertinent portions of the Act of March 3, 1853, 10 Stat. 244, granting school lands to the State of California, are set forth in the appendix, *infra*, pp. 21-22.

QUESTION PRESENTED

Whether a second official survey of a section of land granted to California as school land, which was made to correct errors in the first official survey, passed title to new lands thus brought within the section in addition to lands granted by the original survey.

STATEMENT

The United States instituted this action to quiet title and to enjoin trespasses on certain land in Kern County, California, by filing a complaint against the appellees on May 2, 1947 (R. 2-14, 51). The facts on which the action depend are as follows:

By the Act of March 3, 1853, 10 Stat. 244, the United States granted to the State of California Sections 16 and 36 of every township of the public domain for the support of its common schools. The Act also provided for selection of lieu lands by the State for acreages settled within such sections before survey.

On February 4, 1869, the United States employed one John Reed to survey certain areas of the public lands in California (R. 65). Pursuant thereto he surveyed and located, among others, Section 36 of Township 29 South, Range 20 East, Mount Diablo Base and Meridian (R. 6, 28, 66). The survey was approved by the United States Surveyor General for California on April

27, 1869, and a plat of it was filed with the Register of the United States Land Office at Visalia on May 28, 1869 (R. 5, 12, 82, 117, 119). Section 36 contained approximately 40 acres more than the standard 640-acre section (R. 29, 83, 84, 87, 89, 135, 172, 177).

The State acted upon the Reed survey of Section 36 in the following way. Prior to the Reed survey of 1869, one Edwin M. Crocker had preempted 160 acres, more or less ($SW\frac{1}{4}$ of $NW\frac{1}{4}$, $N\frac{1}{2}$ and $SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Reed's Section 36 (R. 21, 68, 88, 117, 119, 132). Letters patent were issued by the United States to Crocker for those 160 acres in 1871 (R. 21, 68, 88). In 1874 the State of California for its loss of acreage, because of the Crocker preemption, selected as lieu lands 160 acres in Sections 26 and 35 of the same township and subsequently disposed of them to private grantees (R. 21, 88-89). In addition, on March 1, 1873, California patented 360 acres, more or less, ($N\frac{1}{2}$ and $SE\frac{1}{4}$ of $NW\frac{1}{4}$, $NE\frac{1}{4}$, $N\frac{1}{2}$ of $SE\frac{1}{4}$) of Reed's Section 36 to Henry Miller and Charles Lux (R. 67, 83-84, 87). On November 29, 1892, the State issued a certificate of purchase to one J. J. Mack of the remaining 120 acres ($S\frac{1}{2}$ of $SE\frac{1}{4}$ and $SE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 36 (R. 73, 77, 79). A patent was issued March 9, 1894 (R. 69-71, 82). This patent, as well as the one to Miller and Lux, recited "that the tracts of Grant of Sixteenth and Thirty-sixth Section School Land hereinafter described have been duly and properly located in accordance with law" (R. 67, 70).

In 1892, the Assistant Commissioner of the General Land Office ordered a new survey of Township 29 South, Range 20 East, because investigation indicated that there was a strip of land between this township and adjoining townships which was not covered by any of the surveys of those townships (R. 93-104). It further indicated that the lines run by Reed were "fictitious

and fraudulent” and “worthless as a basis for the disposal of the lands in said township” (R. 93-104).

One Howard B. Carpenter was employed to make the new survey (R. 106-108). His survey was approved by the United States Surveyor General for California on November 18, 1893, and by the Commissioner of the General Land Office on January 31, 1894 (R. 13, 110). The Carpenter survey differed from the Reed survey, as to Section 36, in that the boundary lines were shifted southward and eastward to embrace a considerable tract of land on the south side and a narrow strip on the east side, altogether about 304.63 acres, not theretofore included within the older section lines (R. 14, 28-29, 135, 146, 161; see diagram facing page one hereof). Carpenter’s survey of Section 36 includes about 330 acres of land which had been included by Reed in his Section 36. The remainder of Reed’s Section 36 was shown by Carpenter to be in what Carpenter designated as Sections 25, 26, and 35, on the northern and western borders of Carpenter’s Section 36 (R. 29, 40, 118). The total acreage of Carpenter’s Section 36 was 634.63 acres (R. 13, 29).

Thereafter, on March 25, 1912, the State Surveyor General wrote to the Commissioner of the General Land Office in Washington, D. C., as follows (R. 117-118):

T. 29 S., R. 20 E., M.D.M., was surveyed in 1869 by John Reed and the plat thereof was approved April 27, 1869.

April 15, 1872, the Register of the United States Land Office at Visalia certified that the plat of said township had been on file in his office over ninety days, that the SW $\frac{1}{4}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ and SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Section 36, were pre-empted and that the balance of the section was clear.

Upon the approval and filing of the plat of said township the title to the unencumbered portion of Section 36, as surveyed by Reed, vested in the State of California, and said portion was sold by and patented by the State.

Another survey of T. 29 S., R. 20 E., was made by H. B. Carpenter in 1893 and the plat thereof was approved November 18, 1893. On said plat are shown the N.E., N.W., and S.W. corners of Section 36 as set by John Reed in 1869, but said corners were not adopted by Carpenter in his survey and portions of said Section 36, the title to which vested in the State under the Reed survey are now, according to the Carpenter survey, parts of Sections 25, 26 and 35, and the identity of Section 36 as surveyed by Reed and to which the State claims title, has been destroyed.

Will you kindly advise this office why the identity of Section 36 as surveyed by Reed was not preserved when the Carpenter survey was made and what your department will do to perfect the State's title to Section 36 as surveyed in 1869?

In reply, on April 15, 1912, the Commissioner outlined the facts leading up to the Carpenter survey and the instructions given to Carpenter (R. 119-122). He concluded by stating that "Without attempting at this time to determine the question presented by you as to what the Department will do to perfect the State's title to Section 36 as surveyed in 1869, these facts are placed before you for such further action as the State may wish to take in the matter" (R. 122). Thereupon, the State Surveyor General made the following request of the Commissioner of the General Land Office on May 7, 1912 (R. 123):

* * * the State of California respectfully requests you to construct a township plat and delineate thereon Section 36 as surveyed by John Reed in 1869, being the land the title to which vested in

the State of California upon approval of said survey, which title the State disposed of through patents issued under the laws of the State.

This office is not advised by the General Land Office when a township is surveyed or resurveyed, therefore, when a resurvey is made, in some instances many years elapse before the State discovers that a new survey of a township has been made, which in this case, is the reason for this belated request to show the locus of said Section 36, as surveyed in 1869. The State cannot adjust its claim to a school section located by a resurvey, in a position different from the one originally established, to which the State's title vested.

As a result of this correspondence, the Commissioner, on September 10, 1912, ordered one Lincoln E. Wilkes to relocate on the ground the lines of the Reed survey and make a plat of it in relation to the Carpenter survey (R. 14, 123-137). Carpenter had noted on his survey all but the southeast corner of the Reed survey (R. 118, 121, 126). He had been instructed to note all of Reed's corners on his own survey, as well as all improvements and well-defined claims (R. 107, 121). Wilkes commenced his survey on January 13, 1914, and completed it on January 18, 1914 (R. 14, 134). The United States Surveyor General for California approved it on April 7, 1915 (R. 14, 134).

In the meantime, on March 22, 1912, one Judson H. Jordan, the predecessor in title claimed by appellees, applied to the State Surveyor General and Register of the State Land Office to purchase the lands on the east and south of Section 36, contained in the Carpenter survey of that section but outside the lines of the Reed survey (R. 140, 144, 152-153). The application to purchase this area of approximately 304.63 acres was denied on October 1, 1912, after a full hearing, on the ground that the Reed survey of 1869 "fixed and

established” the “quantity” and “boundary lines” of the Section 36 which vested in the State and that the Section 36 of the Carpenter survey “while designated section 36 is not the section 36 which passed to the State of California under the said Act of March 3, 1853; that the said section 36 which passed to the said State under said act does not include any of the land described in said applicant’s application; that said land belongs to the government of the United States” (R. 149, 152-155).

Jordan then sought mandamus in the Superior Court of California for County of San Francisco to compel approval of the application (R. 139-155). That court granted a writ of mandamus on February 26, 1913 (R. 156-158), and its decision was affirmed by the District Court of Appeals for the First District on July 23, 1914. *Jordan v. Kingsbury*, 25 Cal. App. 166, 143 Pac. 69. Pursuant thereto Jordan’s application to purchase was approved on December 1, 1914, and a patent was issued to him on November 19, 1915, (R. 159-161, 163-165). By mesne conveyances that title to the land is now in the appellees (R. 162).

On May 2, 1947, the United States instituted this action against the appellees to quiet its title to that land (R. 2-14). At the trial the United States contended, as the State had done before, that title to Reed’s Section 36, approved in 1869, passed at that time to the State as its school land section, and that the corrective survey by Carpenter granted no new rights nor affected rights already vested. The appellees urged that the Carpenter survey passed title to the State to all the land which it embraced in Section 36. The district court ruled in favor of the appellees and entered judgment quieting title in them on August 22, 1949 (R. 43-45). This appeal followed (R. 46).

SPECIFICATION OF ERRORS

The statement of points relied upon by the United States on this appeal (R. 46-47) may be summarized as follows:

1. The district court erred in holding that the United States granted to the State of California as school land that portion of the Northeast Quarter and the South Half of Section 36, Township 29 South, Range 20 East, M.D.B. & M., which lies outside the boundaries of the survey of that section by John Reed, but within the lines of that section as surveyed by Howard B. Carpenter.

2. The district court erred in holding that the United States does not have title to the land described in the preceding paragraph.

ARGUMENT

The Resurvey Did Not Pass Title to the State of California to Land Not Included in the Original Approved Survey

The Act of March 3, 1853, 10 Stat. 244, granted "to the State *in praesenti* a quantity of lands equal in amount to the 16th and 36th sections in each township." *Heydenfeldt v. Daney Gold, Etc., Co.*, 93 U.S. 634, 640 (1876). Congress intended "that on the survey, defining the sections, the title to the land should pass to the State provided sale or other disposition had not previously been made, and, if it had been made, that the State should be entitled to select equivalent lands for the described purpose."¹ *United States v. Morrison*, 240 U.S. 192, 201 (1916); *United States v. Wyoming*, 331 U.S. 440, 443 (1947). In these instances of "the grant of the sixteenth and thirty-sixth sections of each

¹ The State of California was not solely dependent upon surveys by the United States. Under the Act of July 23, 1866, 14 Stat. 218, the State could make its own surveys of school lands and obtain title thereby. *Huff v. Doyle*, 93 U.S. 558 (1876).

township to the several states for educational purposes, there is no provision for either listing or patent. Such instruments are deemed unnecessary because Congress in the grant itself has identified the land conveyed with sufficient precision.” *Southern Development Co. v. Enderson*, 200 Fed. 272, 274 (Nev. 1912); *Cooper v. Roberts*, 18 How. 173, 179 (1855); *Hedrick v. Hughes*, 82 U.S. 123, 129 (1872). Surveys of these sections were “officially complete” and passed title when they were approved by the United States Surveyor General for California prior to April 17, 1879, and by the Commissioner of the General Land Office after that date. *Frasher v. O’Connor*, 115 U.S. 102, 114 (1885); *Tubbs v. Wilhoit*, 138 U.S. 134, 142-144 (1891); *United States v. Morrison*, 240 U.S. 192, 210 (1916); *United States v. Cowlshaw*, 202 Fed. 317 (Ore. 1913); *F. A. Hyde & Co.*, 37 L. D. 164 (1908); cf. *United States v. Wyoming*, 331 U.S. 440, 455-456 (1947).

Such a “survey of public lands does not *ascertain* boundaries; it *creates* them.” *Cox v. Hart*, 260 U.S. 427 (1922). “They [the statutes of the United States] further provide that ‘the boundary lines actually run and marked in the surveys returned by the surveyor general shall be established as the proper boundary lines of the sections or subdivisions for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof’. Rev. Stat. Sec. 2396, subdiv. 2.” *Cragin v. Powell*, 128 U. S. 691, 697 (1888). Irregularity in the shape and place of a school land section, arising from the survey of the township, does not defeat the operation of the school grant. *State of Michigan*, 8 L. D. 560 (1889).

Where rights are acquired under an approved survey, the United States is without authority to affect those rights by a corrective survey. As the Supreme

Court said in *United States v. State Investment Co.*, 264 U.S. 206, 212 (1924) :

Although the power to correct surveys of the public land belongs to the political department of the Government and the Land Department has jurisdiction to decide as to such matters while the land is subject to its supervision and before it takes final action, *Cragin v. Powell*, 128 U.S. 691, 698; *Knight v. Land Association*, 142 U.S. 161, 177; *Kirwan v. Murphy*, 189 U.S. 35, 54, this power of supervision and correction by the Department is "subject to the necessary and decided limitation" that when it has once made and approved a Governmental survey of public lands, and has disposed of them, the courts may protect the private rights acquired against interference by corrective surveys subsequently made by the Department. *Cragin v. Powell*, *supra*, p. 699. A resurvey by the United States after the issuance of a patent does not affect the rights of the patentee; the Government, after conveyance of the lands, having "no jurisdiction to intermeddle with them in the form of a second survey." *Kean v. Canal Co.*, 190 U.S. 452, 461. And although the United States, so long as it has not conveyed its land, may survey and resurvey what it owns, and establish and re-establish boundaries, what it thus does is "for its own information" and "cannot affect the rights of owners on the other side of the line already existing." *Lane v. Darlington*, 249 U.S. 331, 333.

In *Lindsey v. Hawes, et al.*, 67 U.S. 554 (1862), the Court said (p. 560) :

It is to be remembered that the original survey of Bennett, was the survey of the Government; that it was made in 1833; that the maps, plats, certificates, and field notes were all filed in the proper office; the survey approved, and that for eleven years, the Government had acted upon and recognized it as valid and correct, and above all had sold the land to Lindsey by this its own survey, received the purchase money

and given him a patent certificate, five years before any suggestion was made of this error. The money thus received by the Government has never been returned, nor do we think it would vary the rights of the parties if it had actually been tendered to him or his heirs. We are of opinion, under these circumstances, that so far as the location of the lines of that quarter section, affect the question of the precise locality of Lindsey's residence, as bearing on his right to enter that fraction as a pre-emption, the Government was bound by the original survey of Bennett.

In *New Mexico v. Colorado*, 267 U. S. 30 (1925), the Court said (p. 41):

Thus, after the Land Department has surveyed and disposed of public lands, the rights therein acquired are not affected by corrective surveys subsequently made by the Department.

In *Cragin v. Powell*, 128 U. S. 691 (1888), the Court said (p. 699):

* * * when the Land Department has once made and approved a Governmental survey of public lands, (the plats, maps, field notes and certificates all having been filed in the proper office), and has sold or disposed of such lands, the courts have power to protect the private rights of a party who has purchased, in good faith, from the Government against the interferences or appropriations of corrective resurveys made by that department subsequently to such disposition or sale.

In *Lane v. Darlington*, 249 U. S. 331 (1919), it was said (p. 334):

But this retracing of the Hancock line is not directed to the plaintiffs, but, as we have said, is an investigation by the United States on its own account.

In *People v. Covell*, 17 Cal. App. 2d 627, 62 P. 2d 602 (1936), the court stated that "whether accurate or

inaccurate, the original survey granting and establishing certain rights fixed the rights not only of the Government, but of the landowners, and that the Government, after establishing such a line and granting and conveying certain rights, possessed no power thereafter to change the course of that line.” In *Churchill Co. v. Beal*, 278 Pac. 894 (Cal. App., 1929), the same court approved the following rule: “When public land has been surveyed by authority of the United States, and patented with reference to the boundaries as fixed by such surveys, the corners and lines so established, whether correct or not, are conclusive and cannot be altered or controlled by other surveys.” This universally applied rule was enacted into statute by the Acts of March 3, 1909, 35 Stat. 845, and June 25, 1910, 36 Stat. 884, 43 U. S. C. 772.

Applying the foregoing law to the present case, it is evident that title to Section 36, as surveyed by Reed, passed irrevocably to California when that survey was approved in 1869. Approval of that survey had the same force as a patent to the State. The State received more than a full section of 640 acres. The rights of the parties with respect to that land became fixed, whether the survey was accurate or not.² The state thus received all the land to which it was entitled. After the rights of the State had thus vested, the United States could not by the corrective resurvey of 1894 recover any excess acreage found to be in the first survey. The new survey in the contemplation of the law

² It is not known what the Commissioner of the General Land Office meant by the word “fraudulent” in connection with the Reed survey (R. 93-104). It seems probable that he used it as descriptive of his conception of the position which the United States should take as between itself and Deputy Surveyor Reed and his bondsman. In any event, as the court below noted (R. 32), there was no fraud between the United States and the State of California. As between them, there was merely a mistake and as appears from the foregoing decisions mistakes do not vitiate a survey.

was only “an investigation by the United States on its own account” and “for its own information”, *Lane v. Darlington, supra*; *United States v. State Investment Co., supra*. It is not reasonable nor equitable to hold that this fixing of rights moved only in one direction. Surely, the United States may correct surveys “for its own information” without thereby granting all land brought into a section for the first time by the new survey, while, at the same time, it is not able to recover land excluded from the section by that survey. It has been held in cases of patented land that the corrective resurvey did not enlarge the land conveyed by the United States under the original survey, even though the description was in terms of section lines. *Gleason v. White*, 199 U. S. 54 (1905); *Gazzam v. Lessee of Elam Phillips, et al.*, 20 How. 372 (1857); *Frank P. Ryan*, 13 L. D. 219 (1891); *Hiram Brown, et al.*, 13 L. D. 392 (1891); *McKittrick Oil Company v. Southern Pacific R. R. Co.*, 37 L. D. 243 (1908). These principles should dispose of the question in this case contrary to the views of the district court and of the appellees.

There is additional reason in law why the original survey in this case governs the lands which passed to the State. We have shown, and the district court recognized (R. 36-37), that the United States is irrevocably bound by the Reed survey. It cannot by a corrective survey intermeddle with the rights which it granted thereby. In such a case, “The Government is bound by its patent; is estopped to disavow the subdivision granted; and as estoppels are mutual, [the grantee] is equally bound by the grant.”³ That principle of mutual estoppel is generally recognized in cases

³ From the dissent in *Brown's Lessee v. Clements*, 3 How. 650, 671 (1844), which was subsequently followed in *Gazzam v. Lessee of Elam Phillips, et al.*, 20 How. 372 (1857), overruling the majority decision in the former case.

granting public lands. In *New Mexico v. Colorado*, 267 U. S. 30, 41 (1925), the Supreme Court said: "And independently of these matters, New Mexico is bound by its own recognition and adoption of the Darling line, from 1912 to the beginning of this suit, after its admission to statehood." In *Kissell v. St. Louis Public Schools*, 18 How. 19 (1855), the Court said (p. 25):

We are further of opinion that the certificate of the Surveyor-General, above set forth and which was accepted by the grantees, is record evidence of title, by the recitals in which the Government and the board of school directors are mutually bound and concluded. And this instrument, declaring that the land prescribed was reserved for the support of schools, and the courts of justice having no power to revise the acts of the surveyor-general under these statutes, as respects the school lands, it is not open to them to inquire whether the lands set apart were or were not lots of the description referred to in the statutes. The parties interested have agreed that this land was a school lot, and here the matter must rest, unless some third person can show a better title.

In *Heydenfeldt v. Daney Gold, Etc., Co.*, 93 U. S. 634 (1876), the Court said (p. 641):

Congress, on the 4th of July, 1866, 14 Stat. 85, by an act concerning lands granted to the State of Nevada, among other things, reserved from sale all mineral lands in the State, and authorized the lines of surveys to be changed from rectangular, so as to exclude them. This was doubtless intended as a construction of the grant under consideration; but whether it be correct or not, and whatever may be the effect of the grant in its original shape, it was clearly competent for the grantee to accept it in its modified form, and agree to the construction put upon it by the grantor. The State, by its legislative act of Feb. 13, 1867, ratified that construction, and accepted the grant with the conditions annexed.

We agree with the Supreme Court of Nevada, that this acceptance "was a recognition by the legislature of the State of the validity of the claim made by the Government of the United States to the mineral lands."

In *United States v. Oregon*, 295 U. S. 1 (1935), the Court said (p. 10) :

We do not pass upon the first ground, but agree that the acceptance by the State of [school] lands elsewhere, in lieu of lands lying within the meander line adjacent to the granted uplands, was such a practical construction of the boundary, and necessarily involved such a relinquishment of any interest in the adjacent lands as an incident to the grant of uplands, as to preclude the assertion of that claim here.

Estoppel was also applied in *Cragin v. Powell*, 128 U. S. 691, 700 (1888), *Gleason v. White*, 199 U. S. 54, 62 (1905), and *St. Paul, M. & M. Ry. Co. v. Sage*, 71 Fed. 40 (C.C.A. 8, 1895), appeal dismissed 18 S. Ct. 946, 42 L. Ed. 1218.

In the instant case, there are more elements of estoppel than justified use of the rule in the foregoing cases. The State officers charged with the acceptance and administration of school land grants insisted repeatedly, and against the very challenge raised here, that the lands added to the Reed survey of Section 36 by the Carpenter survey "while designated section 36 is not the section 36 which passed to the State of California under the said Act of March 3, 1853; that the said section 36 which passed to the said State under said act does not include any of the land described in said applicant's application; that said land belongs to the government of the United States" (R. 154, 82, 117-118, 123, 148-155). In addition, the State conveyed all the land in the Reed survey, and on the basis of that

survey, to private individuals, both before and after (R. 69-71, 82) approval of the Carpenter survey. These conveyances, of course, included lands patented to Miller and Lux lying outside the exterior lines of the Carpenter survey of section 36. Moreover, the State selected and sold lieu lands in place of those pre-empted by Crocker. Most of Crocker's land was west of the west exterior boundary of the Carpenter survey but within the lines of the Reed survey. This last act alone, *United States v. Oregon, supra*, "was such a practical construction of the boundary, and necessarily involved such a relinquishment of any interest in the adjacent lands * * * as to preclude the assertion of that claim here."

There was no act on the part of the United States which would have led the State or appellees' predecessor in title, Jordan, who insisted on a patent against the views of the State officials and with full knowledge of the potential claim of the United States to title, to construe the Carpenter survey as granting additional lands. Neither the State nor Jordan was misled. Inaction on the part of the United States at the time of Jordan's law suit or subsequently could not be a ground for divesting the United States of its title. There is no compelling reason why the *inter alios* decision in *Jordan v. Kingsbury*, 25 Cal. App. 166, 143 Pac. 69 (1914), should have reached the land records of the Department of the Interior, or, if it had, why the Commissioner of the General Land Office or the Secretary of the Interior was required to take any action until, in his opinion, the interests of the United States required it. In any event, the fact is that at all times material the United States has asserted title in itself to lands in California comprising those areas of Sections 16 and 36 added to original surveys by corrective resurveys. Exhibits C, D, E, F-1, F-2, and F-3, submitted to the district

court in the appendix to the Government's brief,⁴ are copies of letters from the Assistant Commissioner of the General Land Office to the Register and Receiver at Los Angeles with copies to the State officials. They all have to do with resurveys of certain townships and contain rulings to the effect that the areas designated as Sections 16 and 36 by such resurveys, to the extent that they differ from the areas so designated by the original surveys, will be administered as public lands.

Exhibit B-1 is a copy of the plat of Wilkes' segregation survey of Section 36, Township 30 S., Range 21 E., M.D.M., approved August 5, 1915. This township corners on the township involved in the instant case. It was originally surveyed by Reed in 1869 at or about the time he surveyed Township 29, Range 20. It was resurveyed by Carpenter under the same instructions (R. 106-109) which governed his resurvey of the township involved here and the segregation survey (B-1) was made by Wilkes at or about the same time and for the same reason that the Wilkes segregation survey of Section 36, Township 29 South, Range 20 East (R. 14) was made. The basic facts in connection with Exhibit B-1 are therefore identical to the facts of the present case.

Both the United States and the State of California have treated the area designated on Exhibit B-1 as lots 1 to 8, inclusive, and S $\frac{1}{2}$ of SW $\frac{1}{4}$, Sec. 36, as public lands of the United States as evidenced by the fact that on October 29, 1919, these lands were filed on by one Richard Whitford and on April 15, 1925, a United States patent was issued to Whitford's heirs. A copy of that patent is Exhibit B-2.

⁴ These exhibits were considered by the district court along with exhibits appended to the appellees' brief (R. 35, 42, 49, 50), and are a part of the record here not printed (R. 49, 50, 196).

Exhibits G and H are copies of the plats of the resurveys of the two townships referred to in Exhibits F-1, F-2, and F-3. An examination of Exhibits B-1, G and H illustrates the results which would follow if it were held that where section lines have been changed by a resurvey the areas designated as Sections 16 and 36 by such resurvey also pass to the State. In such event, a State, under its in place and lieu selection rights, would in many instances become entitled to as many as four different sections on account of the surveys in a single township—and this in spite of the fact that the statute grants but two. Such a ruling would upset all existing titles in Sections 16 and 36 in resurveyed townships in this and other states and would be contrary to the administrative construction of the officials of both the United States and the State of California. The suggestion of the court below (R. 42) that the cited instances are not persuasive because it does not appear there that the State advanced the claim here asserted obviously lacks merit. The present claim did not originate with the State officials. They granted the land to the appellees' predecessors in title only under compulsion of the decree in *Jordan v. Kingsbury*, 25 Cal. App. 166, 143 Pac. 69 (1914).

Further consideration of the effect of the district court's decision emphasizes its error. Since the United States is bound by the original survey, the rule of the district court that the later corrective resurvey passes title to the State to all lands embraced within it would always result in giving the State both sections, whether one was contained within the other, they overlapped as here, or they were entirely separated. This has no support in the granting statute or in reason. Congress did not grant two Sections 36. The rule of the district court makes two Sections 36. It cannot be regarded merely as enlarging the original section. The second survey excludes part of the original survey and, as

we have shown, the original survey stands for all time as to rights which vested under it. Surely, it was not intended that the Commissioner of the General Land Office could not in the public interest correct errors in the surveys of public lands without thus automatically granting more land than either he or Congress intended. That the Commissioner had no intention to detract from or enlarge rights which vested under the Reed survey of 1869 is apparent from the fact that Carpenter was instructed to "carefully locate any improvements or well defined claims of settlers indicated by fences or monuments in order that they may be shown upon the plats of the townships as a basis for adjustment, but before destroying Reed's corners as directed, you will ascertain their relation to your own surveys by bearing and distance" (R. 107). Plainly, he intended the settlers to adjust the *description* of their claims to the new survey. And also "it was assumed that the State would adjust its claim thereto" (R. 122). The fact that Carpenter, as the Commissioner observed, "appears not to have been impressed with the fact either that a patent had been issued for 160 acres under a pre-emption entry in sec. 36 or that any necessity existed for the observance of the fact that the title of the remaining 480 acres had vested in the State under the school land law" (R. 121) does not alter the intention of the Commissioner that the resurvey should not operate to change the status quo.

Finally, the cases relied on by the California District Court of Appeal for the First District in *Jordan v. Kingsbury*, 25 Cal. App. 166, 143 Pac. 69 (1914), and by the district court in this case (R. 30) to establish that the Carpenter survey passed title to the State do not support that holding. The cases of *Cragin v. Powell*, 128 U.S. 691 (1888), and *Gleason v. White*, 199 U.S.

54 (1905), plainly hold that the rights acquired under the first survey will not be diminished nor enlarged by a subsequent survey. *Hardin v. Jordan*, 140 U.S. 371 (1891), did not involve the question of a resurvey. The case of *Knight v. United States Land Association*, 142 U.S. 161 (1891), merely held that the Secretary of the Interior had authority, on appeal, to review and set aside a survey approved by the Commissioner of the General Land Office before any patent issued. See *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 19-21 (1935); *United States v. State Investment Co.*, 264 U.S. 206, 212 (1924); *Pueblo Lands of San Francisco*, 2 L. D. 346 (1883); *Pueblo of San Francisco*, 5 L. D. 483 (1887).

Since, as we have shown, the United States did not by the resurvey grant the land here in question to the State of California, it follows that the patent from the State to appellees' predecessor in title, Jordan, was without effect and that appellees have no title to the land.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be reversed.

Respectfully,

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APRIL 1950.

APPENDIX

The Act of March 3, 1853, 10 Stat. 244, provides:

Sec. 6. *And be it further enacted*, That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter presented. * * *

* * * * *

Sec. 7. *And be it further enacted*, That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall

make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands.

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

VS.

FLORENCE K. LIVINGSTON, Executrix of the Will of
Bronte M. Aikins, Deceased (sued herein as B. M.
Aikins), FLORENCE K. LIVINGSTON, Executrix of
the Last Will of Florence L. Kirchen, Deceased,
GEORGE B. PARKER, NELLE GRENVILLE PARKER,
VERNON S. BATZ (also known as V. S. Batz),
EDNA BATZ, D. M. JORDAN, GEORGE HAY CORPO-
RATION, LTD. (a corporation), HONOLULU OIL
CORPORATION (a corporation), SEABOARD OIL COM-
PANY OF DELAWARE (a corporation), and the
COUNTY OF KERN,

Appellees.

Appeal from the United States District Court for the
Southern District of California.

BRIEF FOR APPELLEES.

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FILED

MAY 5 - 1950

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IN THE
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UNITED STATES OF AMERICA,

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VS.

FLORENCE K. LIVINGSTON, Executrix of the Will of
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CORPORATION (a corporation), SEABOARD OIL COM-
PANY OF DELAWARE (a corporation), and the
COUNTY OF KERN,

Appellees.

**Appeal from the United States District Court for the
Southern District of California.**

BRIEF FOR APPELLEES.

JURISDICTION.

This is an appeal by the United States as plaintiff and appellant from a judgment entered on August 22, 1949, quieting title to the land which is the subject of this action in the appellees and against the United States (R. 43). The jurisdiction of the District Court was invoked under the provisions of 28 U.S.C. 1345, and the jurisdiction of this Court, derived from the provisions of 28 U.S.C. 1291.

STATUTE INVOLVED.

The basic statute upon which the rights of the parties in this case must be determined is the act of Congress of March 3, 1853, 10 Stat. 244, Chap. 145, granting to the State of California, for the support of the common schools, Sections 16 and 36 in every township of the public domain within the state. The pertinent portions of this Act are set forth in the Appendix at pages i and ii.

QUESTION PRESENTED.

Did the State of California acquire title to the land, which is the subject of this action, by reason of the approval, on November 18, 1893, and acceptance¹ on January 31, 1894, of an official survey (the Carpenter survey) made by the Land Department, designating the land in question as a portion of Section 36, Township 29 South, Range 20 East, M.D.B.M., the said land on these dates being unsurveyed, unappropriated public domain of the United States.

¹The mere completion of the work of surveying was not sufficient to vest title in the state. It was necessary that the survey first be approved and the act of approval and its date fixed the time when title vested in the state to school sections. It is to be noted that prior to April 17, 1879, all that was necessary in the way of approval of the plat of a particular survey was that it be approved by the Surveyor General of the particular state in which the survey was made. See *Frasher v. O'Connor*, 115 U.S. 102. On April 17, 1879, however, instructions were issued by the General Land Office that no plats of surveys be filed in the local land offices until they had been approved by the General Land Office. Therefore, before 1879 approval of a survey by a state Surveyor General was the act of approval which fixed the time when title to a school section passed to a state; after that year acceptance and approval by the General Land Office of a survey fixed the time when title to a school section passed to the state. See *U.S. v. Cowlshaw*, 202 Fed. 317 (D.C. Ore. 1913); *F. A. Hyde & Co.*, 37 Land Decisions 164 (1908).

STATEMENT OF THE CASE.

On May 2, 1947, appellant instituted this action to quiet title to, and to enjoin purported trespasses by appellees upon, certain land in Kern County, California, located in Section 36 of Township 29 South, Range 20 East, M. D.B.M. (R. 2-14, 51). This was done more than 54 years after the approval of the Carpenter survey of 1893, and approximately 33 years after the State of California had issued its patent to one Judson H. Jordan for the land involved in this controversy, which is a portion of the land delineated as Section 36 by the approved Carpenter survey. Appellees deraign their title to, or possessory rights in the land by mesne conveyances from Jordan (R. 162).

After a trial on the merits, the Court below ruled in favor of appellees, and on August 22, 1949, entered judgment quieting title in them against the appellant (R. 43-45).

Appellees do not dispute, and hereby adopt the statement of facts contained in appellant's brief at pages 2 to 7 inclusive, but in addition to the statement of the case as made by appellant, the following facts should be noted by this Court.

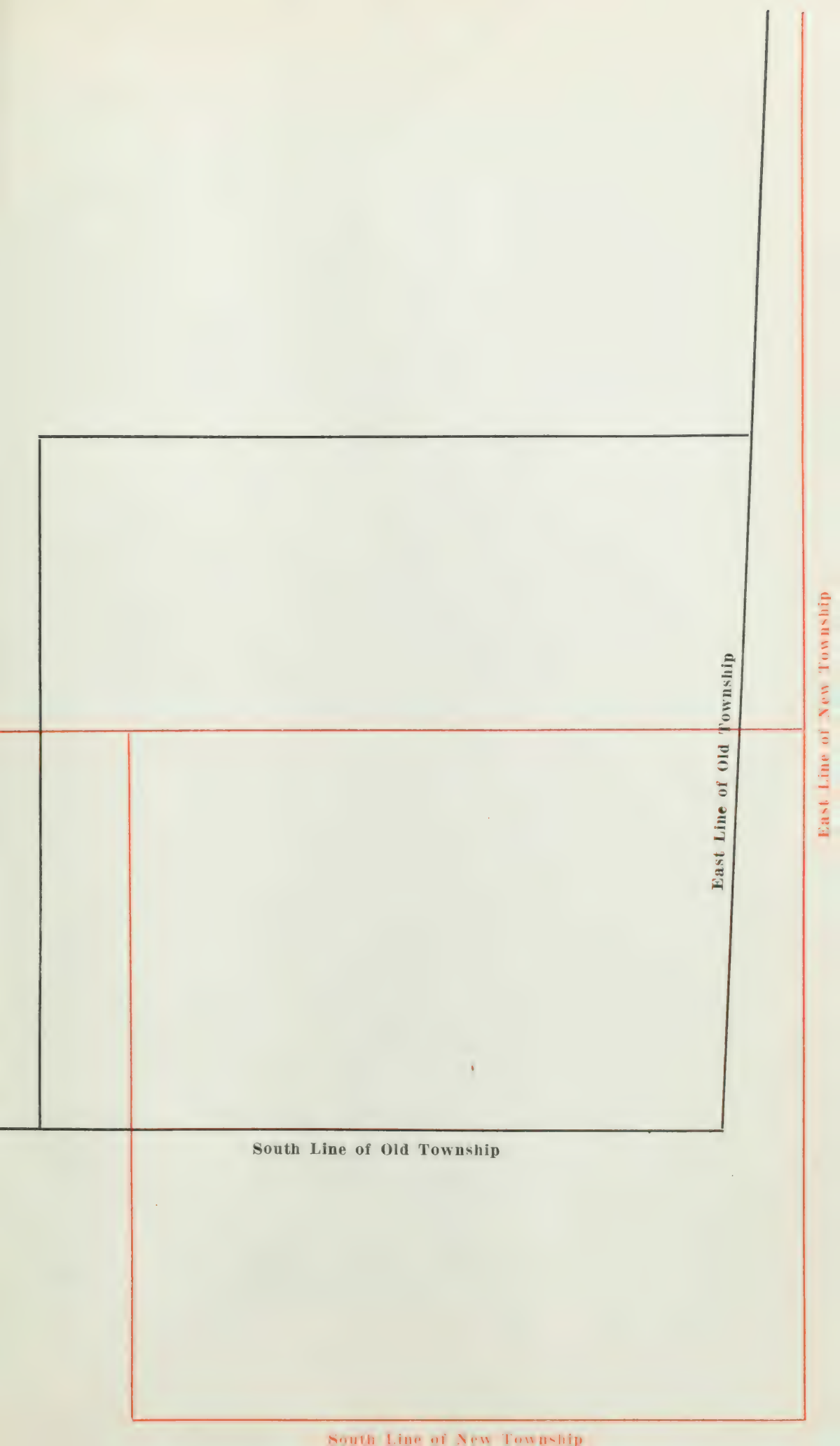
In employing Howard B. Carpenter to make the so-called Carpenter survey of 1893, the instructions issued to said Carpenter by the United States Surveyor General for California directed Carpenter to make a *new* survey of Township 29 South, Range 20 East, M.D.B.M., and further instructed him to obliterate the lines and corners established by Reed in said township in the Reed

survey, and to ignore the Reed survey in making his own (Carpenter's) survey (R. 107).

Prior to the Carpenter survey of 1893, the land involved in this litigation was an *unsurveyed* area of land, a part of the public domain of the United States (R. 95) and not included within the boundaries of Township 29 South, Range 20 East, M.D.B.M., or any adjoining township.

The aggregate area of public land shown to be within Township 29 South, Range 20 East, M.D.B.M. by the Reed Survey of 1869 was 23,083.97 acres (R. 12). The Carpenter survey of 1893, resurveying the said township, placed the easterly boundary line of said township slightly to the East of said boundary as delineated by the Reed survey, and placed the southerly boundary of said township to the South of said boundary as delineated by the Reed survey, and increased the area of land in said township to 24,939.47 acres (R. 13), and for the first time, included within the boundaries of any township the previously unsurveyed land which is the subject of this action (R. 12, 13, 95). The difference in the two surveys, both of which were ordered and approved by the same political authority, is illustrated by the chart facing this page, showing in black the exterior lines of the Reed survey of 1869, and in red the exterior lines of the Carpenter survey of 1893.

All taxes assessed upon or against the land involved in this action have been fully paid by said Judson H. Jordan, or the defendants, or some of them, as his successors in interest (R. 166).

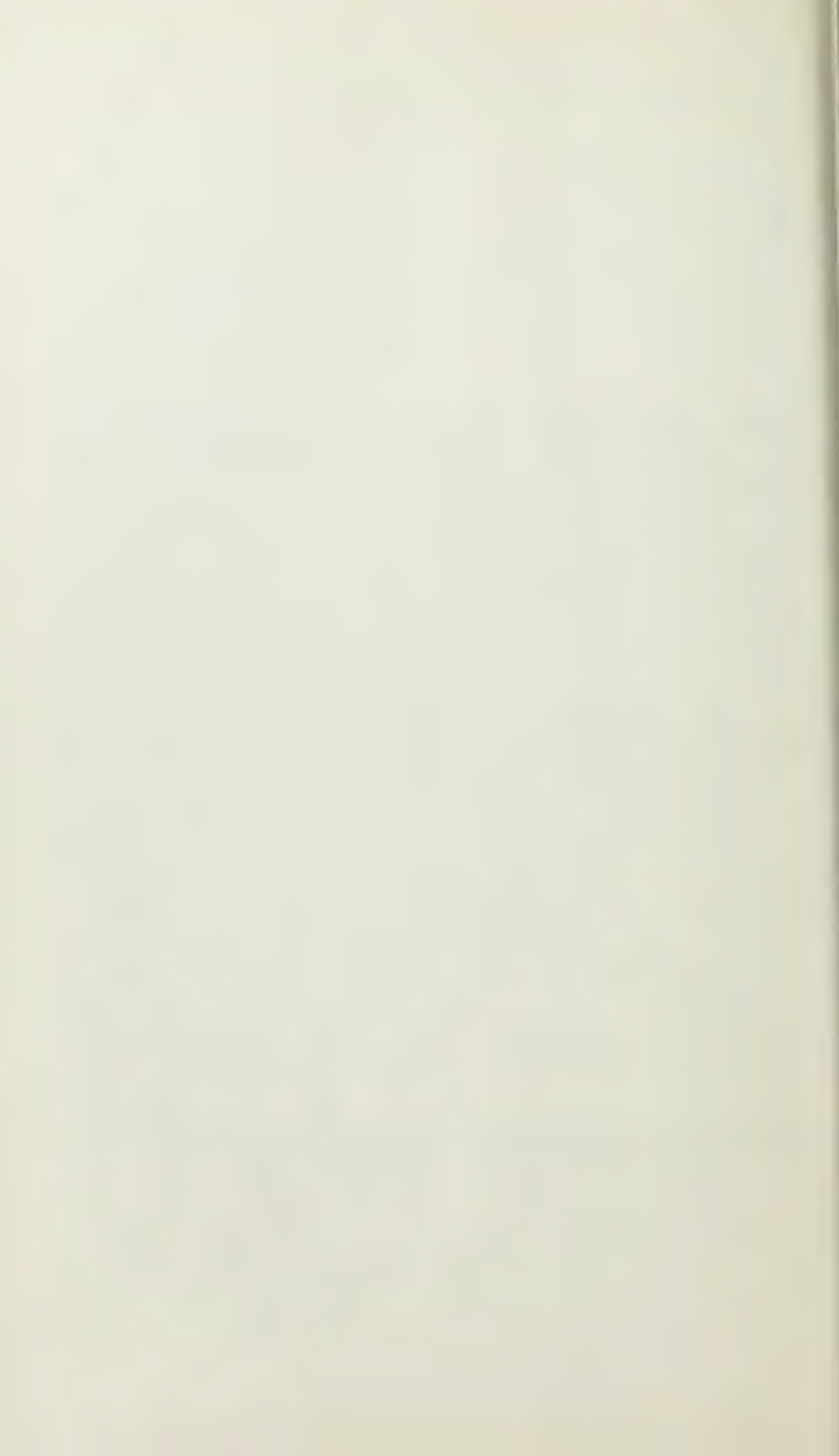


South Line of Old Township

East Line of Old Township

East Line of New Township

South Line of New Township



From and after the passage of the Granting Act of 1853 (10 Stat. 244, Chap. 145) as the surveys of the public lands progressed throughout the State of California, it sometimes happened that surveys delineated Sections 16 or 36 in various townships throughout the State as containing more than 640 acres, and in numerous instances the excess acreage in such sections amounted to several hundred acres. The excess acreage in said school land sections was not objected to by the United States, and said surveys were approved as made and returned, and in each case the State of California received title to the Section 16 or 36 as it was identified by the approved survey regardless of the acreage therein contained. Approximately 145 such school land sections containing excess acreage were surveyed within the State of California, and the surveys approved. (See Appendix "A" to appellees brief filed with the Trial Court, and photostatic copies of plats of survey referred to therein, made a portion of the record pursuant to stipulation, R. 196).

In at least thirty-six instances, the whole or a portion of the lands lying within these Sections 16 or 36 containing excess acreage was unavailable in place to the State of California by reason of the existence therein of minerals, or because of pre-emption claims, or for some other reason. In each of these instances, the State of California claimed land lost from such sections, and lieu lands were certified to the State of California by the United States for an amount sufficient to give the State of California on account of such section, an area of land equal to the number of acres in the section as originally surveyed, although the certification to the

State of California of such lieu lands resulted in the State receiving a total acreage for such section in excess of 640 acres (See Appendix "B" to appellees' brief filed with the Trial Court, made a portion of the record pursuant to stipulation, R. 196).

The total number of acres contained within the area of land embraced by both the Reed survey of 1869 and the Carpenter survey of 1893 is 943.14 acres (R. 14).

ARGUMENT.

There is but one basic issue to be decided by this Court, and that is whether under the plain words of the Granting Act of 1853 (10 Stat., Chap. 145), the approval and acceptance of the Carpenter survey of 1893 operated to vest title in the State of California to the land in litigation, said land at the time of the approval of said survey being vacant, unappropriated, theretofore unsurveyed, public domain of the United States.

Not much can be added to what the lower Court had to say in its Memorandum Opinion (R. 28-42), which clearly sets forth the legal principle involved in this case. Unless appellant can demonstrate the asserted error of the Court below in holding that title to the land in question passed as a matter of law to the State of California, this appeal should fail. Nothing has been shown by appellant which would cast any doubt on the correctness of the District Court's judgment.

The appellant has simply stated (appellant's brief, page 8) that title to the land in question did not pass to

the State of California. Appellant asserts this to be the fact, because, it says:

(a) The Reed survey passed title to the land embraced within it to the State, which fixed the rights of the parties; the State received "all the land to which it was entitled" and the Carpenter survey could not result in the United States recovering any of the land embraced in the Reed section, nor could it pass title to any additional land not embraced in the Reed section;

(b) Both the United States and the State of California were "mutually estopped" to make any claims inconsistent with the original Reed survey; (The fact that the State disposed of the lands covered by the Reed survey is another basis for the argument of estoppel);

(c) The practice of the United States in the case of other resurveyed sections was to assert title to the land covered by the resurvey and therefore this should be controlling here;

(d) The State of California never claimed title to the land in question;

(e) The decision of the District Court creates two Sections 36, whereas the Granting Act intended there to be only one Section 36;

(f) It was not the "intent" of the Commissioner of the General Land Office, in making and approving the Carpenter survey of 1893, to pass title to the State to the land included therein.

These various contentions, as stated by the District Court in its Opinion (R. 36), all come down to the ultimate contention by appellant that there is something which prevents the State of California from ever receiving more than 640 acres on account of any Section 16 or 36 in a particular township, and that once the State has received such a full-sized section (or its equivalent), it is forever satisfied and the force of the Granting Act has become exhausted. We shall take up the appellant's grounds for contending that title did not pass as briefly as possible in connection with the basic legal principle applicable to school land grants.

I.

THE GRANTING ACT OF 1853 WAS A PRESENT GRANT OF SECTIONS 16 AND 36 OF EVERY TOWNSHIP AND TITLE TO THE LAND THEREIN VESTED IN THE STATE IMMEDIATELY UPON THE APPROVAL OF A SURVEY OF THE TOWNSHIP IN WHICH THE SECTIONS WERE FOUND, WITHOUT THE NECESSITY OF ANY FURTHER ACT ON THE PART OF THE STATE, THE LAND DEPARTMENT, OR ANYONE ELSE.

This fact is recognized by appellant in its brief (pages 8, 9), but appellant seemingly overlooks the significance of this proposition.

It must be remembered that this whole case rests upon the construction of the words of donation in the Granting Act of 1853, which in plain, simple and unambiguous language states that Sections 16 and 36 “* * * shall be and hereby are granted to the State, for the purpose of public schools in each township, * * *”

It is settled law that under the various school land grants (all of which have been construed by the courts in harmony with their broad, general purpose) title to the land granted to the State vested in the State without the necessity of any further act by either the State or the United States, upon the approval of the survey delineating those sections within any particular township. As stated in the leading case of *Cooper v. Roberts*, 18 How. 173 (1856), at page 179,

“We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. *But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.* The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature and under the cognizance and protection of the judicial authorities, as well as the others. *Gaines v. Nicholson*, 9 How. 356.” (Emphasis supplied.)

The cases cited by appellant on pages 8 and 9 of its brief are all to the same effect; namely, that title passed to the State immediately upon the approval of a survey delineating a particular Section 16 or 36, provided, of course, that the land so included was in a condition to pass to the State, that is, not mineral land, Indian or other reservation, appropriated, or for some other reason unavailable.

There is nothing in the Granting Act of 1853 itself, or in any decision construing school land grants, which would indicate that the force of the Act is exhausted by the operation of a single survey, or which would in any way limit the effect of the approval of any survey delineating a portion of unappropriated public domain as lying within Sections 16 or 36 of a township. Much of appellant's argument is founded on the mere assertion that the Granting Act operated to vest title only in the case of an original survey but never in the case of a resurvey. It should be borne in mind, however, that, as will be more clearly pointed out below, insofar as the particular land here in question is concerned, the Carpenter survey of 1893 was not a resurvey in any sense of the word; it was the first and original survey that had ever included the land in question within the boundaries of any surveyed township; prior to the Carpenter survey of 1893 this land was a portion of the unsurveyed public domain of the United States (R. 95).

Unless, therefore, the appellant can demonstrate successfully to this Court why the usual and invariable result did not follow the approval of the Carpenter survey of 1893, it must be held as a matter of law that title to the land in litigation passed to the State of California on the approval of that survey.

II.

THE FACT OF THE REED SURVEY HAVING BEEN MADE AND APPROVED IN 1869 IS NOT DETERMINATIVE OF THIS CASE.

Appellant, on pages 10, 11 and 12 of its brief, argues the point that once title had passed to the State of California under the Reed survey, the United States could not get this particular parcel of land back, and it argues from this that the rights of the State and the United States were forever fixed by the making and approval of that survey.

It is true that, as stated by appellant, a resurvey in and of itself does not operate to impair vested rights, or to divest legal title which has vested under a prior although erroneous survey.

United States v. State Investment Co., 264 U.S. 206 (1924).

As we will point out below, however, this rule has no bearing upon the question whether an approved survey *which itself operates to cause title to the land which it identifies to vest under a Congressional grant of unappropriated public domain*, is effective to vest title to such land in the State.

Passing this point for the present, it is obvious that the real contention of appellant is the simple proposition that because the State of California in 1869 received, under an erroneous survey, certain land to which it would not have been entitled had the survey been correct, the *correct and approved* Carpenter survey did not operate to pass title to the State, for *the sole reason that the State would thereby acquire more than 1280 acres of school land in the township*.

The fact of the Reed survey having been made and approved is wholly irrelevant to the question in this case, which question is, simply, what was the effect of the approval of the Carpenter survey of 1893? The approval by the Surveyor General of Reed's 1869 survey may have been erroneous because the survey itself was wrong, but if so, this was simply an error committed by the Surveyor General. The effect of this approval was to vest title to a certain parcel of land in the State of California. Whether or not the United States could have, after the Carpenter survey of 1893, recovered this identical portion of land from the State after the survey was made is really immaterial.

The Reed survey of 1869 was entirely superseded by the Carpenter survey of 1893, and the area of land surveyed by Reed *ceased to be Section 36* upon the approval of the Carpenter survey; this for the reason that the Carpenter survey amounted to a cancellation of the Reed survey.

Cox v. Hart, 260 U.S. 427 (1922).

The fact that the Reed survey may have erroneously operated to vest title to certain land in the State of California, therefore, has nothing to do with the question of whether the land involved in this litigation, which is in the only presently existing Section 36 in this particular township vested in the State of California as a portion of that Section 36. Part of the land covered by the Reed survey is no longer in Section 36. It is simply a parcel of land the legal title to which vested in the State of California by reason of a mistake on the part of the Land Department. It would seem obvious that this mistake, and this conse-

quent vesting of legal title under the Reed survey, cannot be determinative of the question whether the approval of a subsequent survey caused title to unappropriated, unsurveyed public domain in the only presently existing Section 36 in this particular township, to vest in the State of California. It cannot be too strongly emphasized that *the only Section 36 in this township is the one delineated by the Carpenter survey of 1893*, which fact, incidentally, was confirmed by the Wilkes segregation survey of 1915.

Appellant has cited (Brief, p. 13) a number of cases to the effect that where land has been *patented*, a resurvey does not have the effect of either enlarging or diminishing the area of land conveyed to the patentee by the patent. This is, of course, a well recognized principle, but it does not, as the appellant says it does on page 13 of its brief, dispose of the question in this case. A patent, once given, defines the rights of the patentee and vests title in him to the particular area of land embraced by the patent. In order to avoid confusion and conflict in patents issued by the United States, it has always been held that the original survey controlled the grant of the patent, so that neither a subsequent resurvey nor a subsequent conflicting patent could either divest or enlarge the rights of the patentee, as fixed by the patent, as applied to the survey in force at the time the patent was issued. There is nothing in any of these cases, of course, that even intimates that, if a *second patent* were issued to the patentee after a corrective resurvey had been made, the patentee could not acquire rights under the new patent. Appellant has already recognized in its brief (pages 8, 9) that in the case of school land grants no patent is necessary

and no patent, in fact, has ever been issued in the case of a school land grant, for the reason that the approval of the survey, either by the State Surveyor General before 1879, or the Commissioner of the General Land Office after that date *has the effect of a patent*. In other words, *the approval of a survey of a Section 16 or 36 of unappropriated public domain operates to convey title exactly as does a patent, in the case of other lands, issued by the Land Department.*

If appellant wishes to pursue this analogy, therefore, it is simply saying that a second "patent" was issued to the State of California when the General Land Office approved the Carpenter survey of 1893, because it is established law that the approval of the survey of a Section 16 or 36 operated to convey title exactly in the same way that a patent would have conveyed it.

This distinction is most important, and it must be remembered that the unique operation of surveys in regard to school land grants is not comparable to the effect of surveys where patents, in other cases, are issued under the public land system of the United States. Under the school land grants, the official approval of a survey by the Land Department operates to convey title exactly in the same way as would a patent or other conveyance by such Department.

Heydenfeldt v. Daney Gold Mining Co., 93 U.S. 634 (1876);

Cooper v. Roberts, 18 How. 173 (1856);

Sherman v. Buick, 93 U.S. 209 (1876);

Frasher v. O'Connor, 115 U.S. 102 (1885);

U. S. v. Morrison, 240 U.S. 192 (1916).

Official approval of a survey of a Section 16 or 36 in any township, therefore, has a particular significance in relation to school land grants because, as we have said, such approval constituted, in effect, the giving of a patent by the United States to the State. It is, therefore, impossible to draw any analogy from the usual patent cases as to the operation of a second survey for the reason that, as we have stated above but cannot too strongly emphasize, the second or Carpenter survey of 1893 operated to pass title in the same way as a second patent would so operate, just as the first or Reed survey operated to pass title if said land had been granted by means of a patent. In the usual case of the issuance of a patent, the survey has no particular significance except as *identifying the parcel of ground upon which the grant of the patent operates*; in the case of school land grants, however, the survey itself performs a second and essential function, which is that *its approval operates to vest title* in the State to the lands covered by the survey.

The case of

Kissell v. St. Louis Public Schools, 18 How. 19 (1855),

cited on page 14 of appellant's brief is not a case involving school land sections as they were granted under the Granting Act of 1853. That case involved Acts of Congress of June 13, 1912, May 26, 1824, and January 27, 1831, and under these Acts the United States granted to the State of Missouri or to the inhabitants of certain towns therein "towns or village lots, out lots, and common field lots" adjoining these certain towns, for the use of public schools. The act in question under which the

survey in the *Kissell* case was made was the Act of May 26, 1824, which granted these lots which were vacant and uninhabited to the towns and villages for the support of schools. The Act provided that the owners of such lots as were already under cultivation or in possession of private persons should designate them to enable the Surveyor General to distinguish the private lots from the vacant lots, and further provided that the Surveyor General should survey, designate and set apart to the towns and villages so much of the vacant lots as did not exceed one twentieth ($1/20$ th) part of the lands included in the general survey of the town. Under this Act the Surveyor General issued certificates entitled certificates of "Assignment and Survey". Clearly, the grant in the *Kissell* case resembled the issuance of a patent and was not a continuing² grant of designated sections of land such as is found in the Act of 1853. The situation in the *Kissell* case, therefore, does not compare to the situation under the school land grants of sections of townships in the western states which were enacted many years later.

The case of

Heydenfeldt v. Daney Gold Mining Co., 93 U.S.
634 (1876),

simply held that the Nevada Enabling Act of March 21, 1864 (13 Stat. 30) was to be construed in granting Sections 16 and 36 to the State of Nevada as excluding from the grant the whole or any part of such sections as had

²It certainly was contemplated by Congress that the Act of 1853 would necessarily continue in force and effect for an indefinite period of time in order that, as the surveys of the public lands progressed throughout the state, Sections 16 and 36 in each township would pass to the state when they were surveyed. It is obvious that the Granting Act is still in force and effect for there are some townships in California that have not yet been completely surveyed.

been previously disposed of by Congress and that the mineral claims on these sections rendered them unavailable to the State to the extent of such mineral claims.

III.

THERE IS NO LIMITATION ON THE AMOUNT OF SCHOOL LAND TO BE RECEIVED BY A STATE IN ANY TOWNSHIP.

Inherent in the whole argument of appellant is the underlying theory that the State, once it receives a section containing 640 acres, is forever satisfied because the State cannot legally get any more school land than this amount. This is the only possible explanation for its argument that the approval of the Reed survey forever fixed the rights of the parties, for what other basis can there be for this assertion?

Appellant has argued that the State was "estopped" to claim any more land than was included in the original survey, and for this proposition has cited (Brief, p. 15) the case of

United States v. Oregon, 295 U.S. 1 (1935).

Appellant asserts that the State of California, by accepting the land embraced within the Reed survey and further by accepting a lieu selection on account of a portion of that section which was unavailable in place, is estopped to claim any land under the Carpenter survey. We admit, in fact we assert, that the State was entitled to all the land embraced within Reed's Section 36 and to lieu lands for any land within that section which was unavailable in place to the State. However, we do not think that this fact has any significance in this case.

The case of *United States v. Oregon* presents an application of another well-known rule, which does not come into play in this case. All that case stands for is that, if the State takes land in lieu of all or any part of the base section, the State, in effect, "trades horses" with the Government, and having so taken land elsewhere, in lieu of the particular land which was unavailable, it waives all right, title and interest in and to such base. Consequently nothing that thereafter happens to such base is of interest to the State because it has previously made an exchange; the base land can thereafter be enlarged, diminished or relocated without any prejudice to the right of the State because it has said, in effect, "I relinquish all my right to Section 36 in consideration that you give me another section elsewhere." There is nothing anywhere in that or any other case to indicate that because the State receives land in lieu of a *portion* of a school section unavailable in place, it has thereby waived its rights to the balance of such section. Only if the State of California had taken land in lieu of the particular land here involved would *United States v. Oregon* be a controlling precedent; such, of course, is not the case.

The situation in *United States v. Oregon*, therefore, is not a fair analogy to the present situation, and the rule of law applicable to the relinquishment of base school sections by the State taking lieu sections, does not operate here.

The argument of estoppel made by appellant is, basically, that an original survey of a township delineating the school land sections therein amounts to a settlement or agreement between the United States and the State as

to such township that the land included within the school sections as surveyed—and that land alone—is school land of the State, and that all other land in the township excluded from such sections remains (ignoring pre-empted or other similar lands) public domain of the United States. Even assuming for the purpose of argument that this can be so, it is plain that this “estoppel” can operate only as to land *which is included in the township as surveyed*. It is plain that it could not affect land such as the land in question which was excluded from Township 29 South, Range 20 East, M.D.B.M. by the Reed survey, and, which, in fact, was never (until the Carpenter survey) included within the boundaries of any surveyed township. No so-called estoppel arising from the making and approval of the Reed survey therefore could have affected the land in question which was never covered by such survey.

As we have already noted, the Granting Act, in plain and unambiguous language, grants to the State Sections 16 and 36 in every township, and there is no limitation upon this language. The surveying statutes of the United States now in force, and in force at the time of the surveys herein involved (43 U.S.C. 751, and following) contemplate an orderly system of surveys progressing from East to West, but there is nothing therein which limits the size of a school land section or any other section to 640 acres. The fact that sections may be larger or smaller than the ideal is recognized by the surveying statutes (43 U.S.C. 752, Par. 3rd) wherein it is provided that each section or subdivision of a section, the contents whereof have been returned by a survey made by the Field Sur-

veying Service “* * * shall be held and considered as containing the exact quantity expressed in the return.” Thus it is the section as actually surveyed, whether containing more or less than 640 acres, that governs in the disposal of the public lands.

State of Florida v. Watson, 17 Land Decisions 88 (1893).

An act of Congress subsequent to the Granting Act (26 Stat. 796, 43 U.S.C. 851) provides that a state can select lieu lands where Sections 16 or 36 are fractional in quantity. This amounts to a legislative declaration that a state is entitled to *at least* 640 acres in, or on account of, each of Sections 16 and 36. There is no indication anywhere, however, that a state is *limited* to an area of 640 acres for any school land section.

As appears from the evidence contained in the appendices to appellees’ brief filed with the District Court (R. 196), the public surveyes in the State of California produced 145 school sections which were surveyed out as containing more than 640 acres, and the United States in each instance made no objection to the State receiving the full acreage contained in each of these sections. One of these sections, for example, Section 36, Township 12 North, Range 18 East, M.D.B.M., contains 1,716.70 acres, and several other sections contain over 1,000 acres, and many contain in excess of 700, 800 and 900 acres.

Furthermore, as appears from the excerpts from the official clearlists contained in Appendix “B” to appellees’ brief before the District Court (R. 196), in many cases the United States actually certified to the State of California lieu lands for losses in these oversized sections in amounts

sufficient to make up the acreage as surveyed out in the section, even though it greatly exceeded 640. For example, in the section above noted containing 1,716.70 acres, the United States certified to the State of California 1,076.70 acres of lieu lands for lands which were unavailable in place to the State within that section; this, although the State had already received exactly 640 acres in place within the section!

As stated by the District Court in its opinion (R. 34, 35), it is a matter of common knowledge that the State in many instances received school lands in various townships greatly in excess of the normal acreage which would be in Sections 16 and 36, that is, 1280 acres. There is nothing to prevent the State from receiving this excess acreage, because the Granting Act speaks in terms of sections, not acres. Unless it can be demonstrated that, as a matter of law, the State was limited to a maximum of 640 acres for each Section 16 and 36 within any particular township, there is no basis for the argument of estoppel because that argument assumes that the State got everything that it could legally receive when it received 640 acres under the Reed survey. Under both the Reed and Carpenter surveys, the State of California received a total of 1,583.14 acres of school land in the township. Far greater acreages of school land than this were received in other townships.

If, as the District Court stated in its opinion (R. 35) there is any limitation on the amount of land that can be received by the State for school lands, then all the *original* surveys of which we have just spoken should be void and of no effect as passing title to the State to any more

than 640 acres for each section; but as we have shown, this was never considered to be the case. There is no logical reason why, under the plain words of the Act, the State should not receive on account of Section 36, Township 29 South, Range 20 East, M.D.B.M., a total of 943.14 acres on two surveys, than why it should not have received this amount on one survey.

Appellant asserts (Brief, p. 18) that the decision of the Court below results in creating two Sections 36, and that the Granting Act granted to the State only one Section 36. This is not so. The only Section 36 now existing in Township 29 South, Range 20 East, M.D.B.M., is the Section 36 created by the Carpenter survey of 1893, and reaffirmed and re-established by the Wilkes segregation survey of 1915. The school land excluded from the Carpenter survey which vested in the State because of the approval of the mistaken Reed survey is not now in Section 36; the land in controversy lies within the only legally existing Section 36 within the township.

A close analysis of every contention of the appellant discloses that the basic assumption upon which each is rested is that the State is not entitled to more than 640 acres of school land for any Section 16 or 36 within the township; the various arguments in relation to resurveys, patents, and estoppel may unfortunately serve to confuse and obscure this basic assumption, but cannot eliminate it. If it be admitted by appellant (as it must be) that the State is entitled to a school section in place, regardless of whether it contains 640 acres or 1,000 acres, as delineated in one approved survey, we fail to see how appellant can argue that the mere fact that 943.14 acres

vested in the State under two different, approved surveys, both made and approved by the arm of the Government having jurisdiction to make and approve them, somehow establishes a different rule.

IV.

TO HOLD THAT THE APPROVAL OF THE CARPENTER SURVEY OF 1893 WAS INEFFECTIVE TO VEST TITLE IN THE STATE OF CALIFORNIA WOULD BE A JUDICIAL INVASION OF THE EXCLUSIVE JURISDICTION OF THE LAND DEPARTMENT OVER THE PUBLIC DOMAIN.

The appellant argues (Brief, pp. 18, 19) that the decision of the Court below has the effect of always giving the State "both sections" in the case of a resurvey, and that it was not the "intent" of the Commissioner of the General Land Office to vest title to the State to Section 36 under the Carpenter survey. We think the simple answer to this is that the effect of the Carpenter survey of 1893 did not depend upon any undisclosed "intent" of the Commissioner of the General Land Office, but rather upon the legal effect of the survey in the light of the Granting Act of 1853.

It is axiomatic that Congress has the supreme power and authority to dispose of the public lands of the United States by means of such legislation as it sees fit to enact. Congress, therefore, when it enacted the school land grant of 1853 by which it, in clear and specific language, granted every 16th and 36th section in each township to the State of California, expressed its supreme and ultimate decision as to the disposition of these public land sections,

leaving no room for any department of the Government to speculate on what should have been done, or ought to have been granted to the State of California. Acting under the authority of this congressional grant, the Land Department is vested with the exclusive power and jurisdiction to make the surveys or correct the surveys which locate these school land sections within any particular township of the public domain.

Cragin v. Powell, 128 U.S. 691 (1888);

Knight v. United States Land Association, 142 U.S. 161 (1891);

Gleason v. White, 199 U.S. 54 (1905).

Under these cases, the power of the Land Department to make and correct surveys of the public lands is exclusive and supreme, and a survey of the public lands, once approved, can only be attacked in a direct proceeding for that purpose to set aside or annul the survey. In other words, the Courts will not attempt to decide for themselves questions concerning the correctness of matters which by law are committed to the Land Department.

There can be no doubt that when the Carpenter survey of 1893 was made, the land in question was a part of the public domain of the United States, since, prior to such time, such land was *unsurveyed unappropriated land* of the United States.

Prior to the Carpenter survey the land in question had never been by any survey placed within the boundaries of any township; a hiatus existed between the boundaries of Township 29 South, Range 20 East and the adjoining townships, and the land in question had not been

either included in or excluded from a school section in any surveyed township prior to the Carpenter survey (R. 95). Thus, insofar as the land in question is concerned, the Carpenter survey of 1893 was not a resurvey in any sense of the word; it was the first survey that had ever been made that affected in any way that particular land.

Such lands could have been disposed of by the Land Department under any of the many laws relating to the disposal of public lands of the United States. Prior to the Carpenter survey it could, for example, have been patented to a purchaser thereof. The Land Department in 1893 was perfectly aware of the indisputable law that the approval of an official survey of a township operated to vest title in the State to Sections 16 and 36 if the same were unappropriated public lands. Can there be any doubt that the Land Department, acting within its exclusive jurisdiction, had the power to dispose of the land in controversy (as unappropriated public land at the time of the Carpenter survey) by ordering the Carpenter survey to be made, the legal effect of the approval of which, the Land Department knew, would be to vest legal title in the State? Such method of disposal was merely one of several available to it.

It necessarily follows, therefore, that *the Carpenter survey of 1893 was as effective a method of disposal of the public lands of the United States by the Land Department as would have been a deed, patent, or any other method of conveyance which the Land Department might adopt.*

For this Court to hold, therefore, that the Carpenter survey of 1893 was ineffective for any purpose would obviously be to invade and intermeddle with the jurisdiction of the Land Department.

Knight v. United States Land Association, 142 U.S. 161 (1891).

It is axiomatic that the Land Department in 1893 had the exclusive power and authority to order the Carpenter survey to be made; that it had the power to dispose of the public lands of the United States; that all that was necessary to cause legal title to vest in the state to school lands was that they be identified by an approved survey as a portion of Sections 16 or 36 in a particular township; and that, therefore, in ordering the Carpenter survey to be made, which survey necessarily the Land Department knew would ascertain and designate these sections, the Land Department brought into operation the school land grant just as it brought that grant into operation every time it ordered a survey to be made of a township in the public domain.

On this question the language in

Beecher v. Wetherby, 95 U.S. 517 (1877)

is particularly apt. The Court there said, at page 524:

“In *Cooper v. Roberts*, 18 How. 173, this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held, after full consideration, that by it the State acquired such an interest in every section 16 that her title became perfect so soon as the section in any township was designated by the survey. ‘We agree,’ said the court, ‘that, until the

survey of the township and the designation of the specific section, the right of the State rests in compact, —binding, it is true, the public faith, and dependent for execution upon the political authorities. *Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title.* The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.’ In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. *With this identification of the section the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State.’* (Emphasis supplied.)

Since the Granting Act made it possible for the State to receive 1280 acres *or more* in any particular township, it is obvious that in any township there were two ways in which the political authority charged with administration of the Act (the Land Department) could exercise its functions. It might have, through extreme care, so supervised the execution of the public surveys that no Section 16 or 36 ever contained more than 640 acres. It could have designated any excess land within a township as Tracts X, Y and Z, for example, and excluded it from Section 16 or Section 36. If it did this, the State, so long

as it received *at least* 1280 acres of school land in the township, would have no cause for complaint, and the action of the Land Department in this supposed case would certainly fall within any reasonable construction of the Granting Act. On the other hand, the Land Department might have accepted (as it did) surveys of the public lands showing school sections to contain greatly in excess of 640 acres. This exercise of the Land Department's exclusive jurisdiction under the Granting Act also did not violate any possible construction of the Granting Act, since the Act contains no limitation on the acreage which a state may receive.

Thus two courses in the survey of any township were open to the Land Department, neither of which the Courts could thereafter question once any one of them had been taken by the Land Department.

V.

ACTION TAKEN BY THE LAND DEPARTMENT AND THE STATE OF CALIFORNIA IN OTHER TOWNSHIPS IS NOT DETERMINATIVE OF THE ISSUE IN THIS CASE.

As we have already noted, appellant Brief, p. 18) argues that the decision of the District Court has resulted in creating two Sections 36 within the township, and that only one section was granted by the Act. We repeat that there is only one Section 36 in Township 29 South, Range 20 East, M.D.B.M., and that is the section established by the Carpenter survey. What was once Section 36 under the Reed survey is no longer so, although the State of California or its successors have title to the land which

was embraced within such former section. As we have stated, the only staff upon which appellant can lean, therefore, is the proposition that the State has received too much land. The basis of this argument is a mere matter of acreage, and as we have shown, the acreage of school land to which a State is entitled in any particular township has varied widely.

Appellant's real argument in relation to the situation in other resurveyed townships (Brief, pp. 17-19) is that in other resurveyed townships in which a similar situation existed, the State never claimed the land included within a Section 16 or 36 as delineated by a resurvey, and the practice of the Land Department was to treat these areas as continuing to remain a part of the public domain; that, in fact, the State never claimed title to the land in litigation here; that for the Court to depart from the situation as it now exists in other resurveyed townships would not only depart from the "administrative construction" of the Granting Act, but would also upset all existing titles in other resurveyed townships. We shall examine these contentions.

A. The Granting Act of 1853, being plain and unambiguous, is not susceptible of administrative interpretation or construction.

Assuming for a moment that what happened between the State of California and the Land Department in other resurveyed townships amounts to an administrative construction of the Granting Act (which, as will be seen, it does not), then we think it is perfectly plain, and settled law, that courts will adhere to an administrative construction or interpretation of a statute only where the statute

is ambiguous on its face and susceptible of more than one construction. Where the statute is plain and unambiguous, contemporaneous or practical (administrative) construction will not be regarded by the Courts.

Houghton v. Payne, 194 U.S. 88 (1904);

Sutherland on Statutory Construction, 3rd Ed. Vol. 2, Sec. 5104, p. 514.

It would be difficult to find another statute which is as brief, plain, positive and unambiguous as is the granting clause of the Act of 1853, namely, that sections 16 and 36 in every township “* * * shall be and hereby are granted to the State * * *”

Furthermore, if construction were proper, it must be borne in mind that in the application of any school land grant, the broad public purpose of such a grant should be furthered. It is well settled that school land grants, as distinguished from railroad grants and other private grants, must be liberally interpreted in favor of the State, and that a policy of strict construction should not be applied. This was recognized in

Johanson v. Washington, 190 U.S. 179 (1903);

Minnesota v. Hitchcock, 185 U.S. 373 (1902).

However, appellees submit that this is not a case in which administrative construction is permissible.

B. The record does not disclose that there has been any uniform administrative construction of the School Land Grant of 1853 by the Land Department.

Appellant asserts that there existed a uniform administrative practice on the part of the Land Department to treat the title to resurveyed school sections in other town-

ships as being in the United States. As will be seen below, however, there is no evidence of any *uniform* practice of the Land Department in such other townships and in the absence of evidence of such uniformity, the rule of administrative or practical construction is inapplicable.

U. S. v. Magnolia Petroleum Company, 110 Fed. 2d 212 (C.C.A. 10, 1939).

It may be that in the instances given in appellant's brief the Land Department took the position that title to the land in resurveyed school sections is now in the United States. The example of Section 36, Township 30 South, Range 21 East, M.D.B.M., given on page 17 of appellant's brief, is a case in which the United States never made any claim of title until some *four years after* the State had claimed title to the land in litigation in this case and thus offers no precedent as to the question of title to the land in our case, by way of administrative interpretation or otherwise.

As evidencing the lack of any real uniformity in the action of the Land Department, it should be noted that the Land Department itself recognized, as late as 1925, in a similar situation, *that if the State of California had claimed, and patented out or sold as school lands of the State, lands falling within a Section 16 or 36, as delineated by a resurvey, then the United States would not make any claim to such lands so sold or patented out by the State.*

In a letter dated May 2, 1925, from Thomas A. Havell, Assistant Commissioner of the General Land Office, addressed to the State Surveyor General of California (Exhibit F-3 to appellant's brief before the District Court, R.

196), the Assistant Commissioner had under consideration the effect of resurveys of school sections in fractional Township 11 North, Range 21 East, S.B.M., which township was surveyed first in 1883 and resurveyed in 1924. By the resurvey, the area of land in the fractional township was increased from some 7,000 acres to over 16,000 acres, and the State thereby became entitled to additional school lands within the township. The Assistant Commissioner stated that inasmuch as final adjustment had been made of the school land grant in that township, based upon the original plat of survey, it would appear to be the better method of procedure to consider the school section lands as shown by the resurvey to be public lands of the United States, in which event the State could select additional indemnity lands elsewhere to make up the amount of school land to which the State was entitled. The Assistant Commissioner went on to say, however,

“If, however, the State has disposed of or contracted to sell or dispose of any of the lands in Secs. 16 and 36, the Government would not contest the State’s title thereto, but the State would be required to assign other and valid base * * *”

This is a clear indication that the Land Department in this instance, which, we may parenthetically remark, seems to be the only other instance brought to light where the question was presented to the Land Department, conceded that if the State had sold or patented out, or had contracted to sell or patent, any of the lands in the resurveyed school sections, the United States *would not contest the State’s title thereto*. The Commissioner there apparently took the position that if the State had so sold or patented these lands, the United States should not

disturb the title of the State's grantees or patentees, but if it desired reimbursement for these lands, should require the State to assign to the United States lands elsewhere to which the State had title under the school land grant.

Is not that exactly the situation here? It is indeed strange that more than 33 years after the State issued its patent to Jordan, the United States now, for the first time, asserts title to this land as against the grantee (or his successors in interest) of the State of California. Why did not the United States adopt the course recommended in Assistant Commissioner Havell's letter of May 2, 1925, and, if it thought that its rights had been prejudiced, demand *from the State of California* the assignment of lands elsewhere in an amount sufficient to make up the claimed excess that the State had received? This Court should note that, while the State was not made a party to this litigation, the United States *has never, since the date of the patent to Jordan, asserted any claim against the State, or attempted to recover this land, or an equal amount of land elsewhere in lieu thereof, from the State.* This suit, as stated by the Court below in its opinion (R. 42) appears to be the first case of record where the United States has ever attempted to take such action, *and in the only other instance disclosed by the record where it appeared that the State had sold or disposed of, or might have sold or disposed of school lands in a resurveyed school section, the land office took the position that it would not disturb the title of the State's grantees if the State had disposed of or contracted to dispose of such land!*

C. That title to similarly situated lands in other townships in the State of California may now be in the United States or its successors is not determinative of the question of title to the land here involved.

It may well be that, as pointed out by appellant in his brief (page 16 et seq.), the similarly situated lands in other townships in the State of California are now in the United States or its successors in interest. However, the situation in such other townships is not material to the determination of the question of title to the land here in litigation.

In such other resurveyed townships the State not only made no claim to the lands covered by the resurveys, but in fact stood by while the United States patented out such land as its own. If this amounted to a waiver by the State of its title in such a situation, the State presumably had the right to make such waiver, and, in effect, the State then abandoned its title to any acreage of school lands in those sections in excess of the acreage as established on the basis of the original surveys. That was not done in our situation. As we have shown, the State under the terms of the Granting Act was entitled to 1280 acres *or more* in each township, and the right of the State to school lands in any township could, therefore, be settled between the State and the United States on any basis of 1280 acres or more.

If the State through inaction, or in any other way, wished to abandon any claim to lands in excess of, say, 1280 acres, in those townships, that is of no importance here.

Appellant has asserted that the State never actually claimed title to the land in litigation because Surveyor

General Kingsbury was of the opinion that it did not belong to the State. We think this contention can be briefly dismissed with the observation that it is rather plain that the action of the District Court of Appeal of the State of California in the case of

Jordan v. Kingsbury, 25 Cal. App. 166, 143 Pac. 69 (1914),

amounted to a claim by the State—in other words, it amounted to State action. One administrative officer of the State was simply overruled by the judicial arm of the State which was of higher authority, and there can be no doubt that this amounted to a claim by the State. Court action is State action,

Shelley v. Kraemer, 334 U.S. 1 (1947).

In the instant case, the State of California claimed the land included within Section 36, as delineated by the Carpenter survey, and thus claimed a total acreage of school land within the township of 1583.14 acres. There was nothing in the Act to prevent the State from receiving this amount of land, and there was nothing the Land Department could or should have done in this case to prevent the State from acquiring legal title to this amount of acreage of school land in the township.

Appellant argues (Brief, p. 16) that there was no reason why the decision in

Jordan v. Kingsbury, 25 Cal. App. 166 (1914),

should have been known to the Department of the Interior, or, if it were known, why the Department should have taken any action thereon, and, therefore, that inaction on the part of the United States at the time of this decision is no reason for divesting the United States of

its title. This argument overlooks the fact that from the time of the Carpenter survey in 1893 until the commencement of this action, the United States never did anything to assert title to the land in question, and up to that time there was no reason for the *State* to do anything in the way of asserting title, because of the firmly established rule that the Carpenter survey itself passed title to the State. *Neither the State, the Land Department, nor anyone else could add anything to the force and effect of that survey as passing title.* If the State, after the approval of a survey of a school section, had asked the Land Department to “do something” to show that the United States “intended” to vest title to such school lands in the State, the answer of the Land Department would necessarily have been that there was nothing that they, or anyone else, could do to bring about this result for the reason that when the survey was approved, *such approval operated to vest title*, and everything that could be done in the way of vesting title had already been done. The fact remains that long before the United States had advanced any claim to the land in litigation, the State of California *had* claimed it as school land, and patented it out; no “recognition” of this claim by the Land Department could have added anything to the effect of the Carpenter survey, under the authorities noted in the first part of this brief.

VI.

**THE DECISION OF THE COURT BELOW WILL NOT RESULT
IN THE UNSETTLING OF TITLES ELSEWHERE.**

Appellant expresses the fear that the decision of the District Court will result in unsettling titles in every other resurveyed township in the State of California or elsewhere where the section lines of school sections have been relocated and seeks to urge this unfounded fear as a reason for reversing the judgment. Such, however, will not be the result of the decision by the District Court; on the contrary, the decision puts at rest all such titles as they now and have for many years existed.

As we have pointed out, under the plain words of the Granting Act of 1853, title to any unappropriated and otherwise available public land which, due to a resurvey was included within the boundary of a Section 16 or 36, vested in the State of California. Furthermore, if such land was pre-empted, or for some other reason unavailable, the State of California thereby became entitled to lieu land.

Had the State acted with relation to such townships as it did in this particular township, that is, patented out any such land included within a Section 16 or 36 as a result of a resurvey, then the titles resulting from such patent should thereafter have been unassailable by the United States. However, where the State of California stood by without protest while the United States patented out such land, then titles deraigning from such United States patents should be likewise unassailable. It is the latter situation which obtained in the other townships of

the State of California which are referred to in appellant's brief (Brief, p. 17); it is the former situation which has occurred in Township 29 South, Range 20 East, M.D.B.M. In sum, it can be said that the rights of the State of California and of the United States respecting school lands in this township where the State claimed the land included in a resurveyed Section 16 or 36, and in other townships where the State made no such claim, have long since been set at rest and should remain as they are; the decision of the District Court can in no way affect such titles.

The fact that Kingsbury as State Surveyor General and Register of the State Land Office, or his predecessors or successors in office, may have erroneously thought that the State had no title to Sections 16 or 36 as delineated by a resurvey, and may erroneously have stood by and permitted the State to lose its title when the Land Department assumed to patent out these lands to purchasers in good faith, certainly cannot operate to divest the State in this case of the title which it took under the terms of the Granting Act, because in this case that situation did not occur. The fact that the Land Department in other instances may erroneously have assumed to patent out such resurveyed sections and the fact that the patentees thereof may have acquired a good title as against the State of California because the State is now, through its own inaction, unable to assert any title as against these patentees again cannot operate as a construction of or limitation upon the grant of title to the State. The reason that titles in other resurveyed

townships must and will remain at rest under the decision of the District Court is that the State lost the title which it once had; in this case, the State never waived or became estopped to assert the title which it received under the Granting Act, because in this one instance at least, State Surveyor General Kingsbury's erroneous assumption was corrected by the judicial arm of the State. It is thus plain that the decision of the District Court is the only one which will not result in unsettling titles.

CONCLUSION.

Since this is a quiet title action, if appellant is to succeed it must do so on the strength of its own title and not on the weakness, if any, of the appellees' title. Unless the appellant has demonstrated as a matter of law that title to the land in litigation did not vest in the State of California under the Granting Act of 1853 upon the approval of the Carpenter survey, then this appeal must fail.

Appellees submit that:

The argument of appellant that the Reed survey fixed forever the rights of the State because the United States could not thereafter recover any of that land from the State and because the State had received all the land to which it was entitled fails because, as we have shown, there is nothing in the Granting Act to prevent the State from receiving additional acreage which, in fact, has happened repeatedly; there is no specified amount of land

which under the law can be said to be "all the school land to which a state is entitled".

For the same reason there is no estoppel on the part of the State of California to take title to the land in question and this is so for the additional reason that this land was never a part of the original "Reed Township" to which any supposed estoppel must necessarily be limited.

The argument that the "practice" of the United States and the State in other resurveyed sections governs here necessarily falls because, in fact, the Act is not susceptible of administrative construction, and even if it were, there was no uniform administrative interpretation of the Act. Indeed, the position of the Land Department, in the only other instance disclosed by the record where the question was raised as to the State patenting out, or contracting to sell, the land in a resurveyed school section, was that the title of the State's patentees should not be disturbed.

What happened in other townships is immaterial because, as a matter of fact, the State did assert its vested title in this instance although in other townships the State may have lost its once vested title because of the mistaken action of the officials of the State and the Land Department.

The decision of the District Court does not and cannot create "two Sections 36" because as a matter of law, at any given moment of time there can be but one legally existing Section 36 in any township, and the land in

litigation lies within that Section; the effect of the Carpenter survey of 1893 does not and legally could not depend upon "intent" of the Commissioner of the General Land Office at the time he ordered it made, but must depend upon what the law has uniformly and consistently held to be the effect of the making and approval of such survey.

In conclusion, we may remark that if appellant succeeds in this action in unsettling titles that have stood without question for over 33 years, and for more than 54 years after the State acquired its title under the Carpenter survey, the fear expressed by appellant concerning unsettling of titles will be very real indeed. Every title founded upon a congressional grant, thought to be secure and derived from the supreme authority having the power to make the grant, will be subject to attack on this or some similar ground whenever officers of the Government see fit to attempt to recapture real property for some purpose supposed to be in the interest of the Government.

If appellant can now assert title to the land in litigation, there is no logical reason why it could not reverse its position and bring suit to recover from the State of California or its successors in interest the land included in the Reed or any other original survey, but excluded from the Carpenter or any other subsequent survey, although appellant, as a ground of argument for urging that the judgment here be reversed, not only admits but asserts that this could not be done.

Appellees submit that the judgment of the District Court is both legally and equitably correct and should be affirmed.

Dated, San Francisco, California,
May 5, 1950.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

The Act of March 3, 1853, 10 Stat. 244, provides:

Sec. 6. *And be it further enacted*, That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter presented.

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* * * * *

Sec. 7. *And be it further enacted*, That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of

Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands.

